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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

HARVEY F. GARLOTTE,
PETITIONER

VS.

KIRK FORDICE,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

FOR THE PURPOSES OF TITLE 28 U.S.C.A. §§2241 AND 2254, IS AN OFFENDER "IN CUSTODY" DURING THE COMBINED LENGTH OF HIS CONSECUTIVE SENTENCES ON EITHER OF THE SENTENCES?; WHEN THE STATE COMMUTES THE CONSECUTIVE SENTENCES TO A TOTAL COMBINED AND AGGREGATE TERM?; WHEN HE HAS TECHNICALLY SERVED THE FIRST OF THE CONSECUTIVE SENTENCES?; WHEN THE FIRST OF THOSE SENTENCES, THOUGH TECHNICALLY EXPIRED, CONTINUES TO DIRECTLY AFFECT THE SECOND SENTENCE?; WHEN HE HAS DILIGENTLY CHALLENGED THE UNDERLYING CONVICTION AND DURING EXHAUSTING HIS STATE REMEDIES THE SENTENCE TECHNICALLY EXPIRED?

TABLE OF CONTENTS

Question(s) Presented i

Table of Contents ii

Index to Appendix . . . . . iii-iv

Table of Authorities . . . . . v-vi

Opinions Below 1-2

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2-3

Statement of the Case 3-10

Reasons for Granting the Writ 10-19

Conclusion 19

INDEX TO APPENDIX

Appendice-A	Opinion of the Court of Appeals in Garlotte v. Fordice, 29 F.2d 216 (5th Cir. 1994)
Appendice-B	Report and Recommendation of the Magistrate Judge, adopted by the District Court for the Southern District of Mississippi
Appendice-C	Order of the District Court for the Southern District of Mississippi adopting the Report and Recommendation of the Magistrate Judge
Appendice-D	Judgement of the District Court for the Southern District of Mississippi, dismissing the case
Appendice-E	Respondent's "Brief on Remand" submitted in the District Court for the Southern District of Mississippi
Appendice-F	Respondent's Clarification of Exhaustion Issue submitted in the District Court for the Southern District of Mississippi
Appendice-G	Order in the Court of Appeals for the Fifth Circuit granting Certificate of Probable Cause
Appendice-H	Amendment 14 to United States Constitution
Appendice-I	Title 28 U.S.C.A. §2241
Appendice-J	Title 28 U.S.C.A. §2254
Appendice-K	Miss. Code Ann. §47-5-138 (1986)
Appendice-L	Miss. Code Ann. §47-5-139 (1986)
Appendice-M	Miss. Code Ann. §47-5-142 (1985)
Appendice-N	Miss. Code Ann. §47-5-138 (1992)
Appendice-O	Miss. Code Ann. §47-5-139 (1992)
Appendice-P	Miss. Code Ann. §47-5-142 (1992)
Appendice-Q	Miss. Code Ann. §47-7-3 (1993)
Appendice-R	Miss. Code Ann. §99-19-23 (1972)
Appendice-S	Miss. Atty. Gen. Opinion (June, 1993)

INDEX TO APPENDICES

Appendice-T	Sentence Computation Data Sheet, 11-13-92
Appendice-U	Sentence Computation Data Sheet, 10-19-88
Appendice-V	Sentence Somputation Record

TABLE OF AUTHORITIES

CASE	PAGE
Allen v. Dowd, 964 F.2d 745 (8th Cir. 1992)	13
Bernard v. Garraghty, 934 F.2d 52 (4th Cir. 1991) . . .	13, 14
Fawcett v. Bablitch, 926 F.2d 617 (7th Cir. 1992)	14
Fortner v. Singletary, 797 F. Supp. 951 (M.D. FL 1992) . .	14
Fox v. Kelso, 911 F. 2d 563 (11 Cir. 1990)	14
Garlotte v. Fordice, 29 F.3d 216 (5th Cir. 1994) . . .	1, 8-9, 12-13, 15-18
Garlotte v. State, 530 So.2d 693 (MS 1988)	5
Harrison v. State of Indiana, 597 F.2d 115 (7th Ci. 1979)	15
Immigration and Naturalization Service v. Errico, 385 U.S. 214, 87 S.Ct. 473, 17 L.Ed.2d 318 (1966)	18
Maleng v. Cook, 490 U.S. 408, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989)	7, 13, 14, 15, 17, 19
McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934) . .	11
Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 91 L.Ed.2d 397 (1986)	17, 18
N.L.R.B. v. International Longshoreman's Ass'n, 473 U.S. 61, 105 S.Ct. 3045, 87 L.Ed.2d 47 (1985)	17
Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968)	7, 11 12-15
Rodriguez De. Quinjas v. Shearson/American Exp., Inc., 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) . . .	16
United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). . .	18
Willis v. Collins, 989 F.2d 187 (5th Cir. 1993)	18

U.S. CONSTITUTIONAL PROVISIONS — PAGE

Article IV, §2, cl. 1 17

AMENDMENT 14 . . . . . 2, 17

U.S. STATUTES

Title 28 U.S.C.A. §1254(1) 2

Title 28 U.S.C.A. §2241 . . . . . 2, 7, 11-12, 15-17

Title 28 U.S.C.A. §2254 . . . . . 2, 7-8, 11-12, 15-17

U.S. SUPREME COURT RULES

Rule 10.1(a) 18

Rule 10.1(c) 19

MISS. STATUTES

MCA §47-5-138 (1986) 2, 8, 12

MCA §47-5-139 (1986) 2, 8, 9, 12, 14

MCA §47-5-142 (1985) 2, 8, 12

MCA §47-5-138 (1992) 2, 8, 9, 12

MCA §47-5-139 (1992) 2, 8, 9, 12, 14

MCA §47-5-142 (1993) 2, 8, 9, 12

MCA §47-7-3 (1993) 3, 8, 9, 12, 14

MCA §99-19-23 (1972) 3, 8, 12

Miss. Attorney General's Opinion (6-93) 8, 12, 14

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Harvey F. Garlotte (Garlotte), respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit finding that the district court did not have jurisdiction to entertain Garlotte's federal habeas corpus proceedings challenging the validity of his state court conviction because it was the first of two consecutive sentences that he is presently serving and he had technically completed the service of that first consecutive sentence.

OPINION BELOW

The opinion of the court of appeals is reported as **Garlotte v. Fordice**, 29 F.3d 216 (5th Cir. 1994), and is copied at Appendix-A attached hereto. The unpublished Report and Recommendation of the magistrate judge dated February 13, 1992, is copied as Appendix-B attached hereto. The Order of the district court adopting the Report and Recommendation as the

finding of that court, dated June 3, 1992, is copied as Appendix-C attached hereto. The unpublished Judgment of the district court, dated June 3, 1992, dismissing the habeas proceedings with prejudice is copied as Appendix-D attached hereto.

JURISDICTION

The court of appeals decision in this matter was filed and issued on August 19, 1994. No petition for rehearing was filed. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C.A. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment 14 to the United States Constitution is set forth in Appendix-H attached hereto.

Title 28 U.S.C.A. Section 2241 is set forth in Appendix-I attached hereto.

Title 28 U.S.C.A. Section 2254 is set forth in Appendix-J attached hereto.

Miss. Code Ann. Section 47-5-138 (as amended 1986) is set forth in Appendix-K attached hereto.

Miss. Code Ann. Section 47-5-139 (as amended 1986) is set forth in Appendix-L attached hereto.

Miss. Code Ann. Section 47-5-142 (as amended 1985) is set forth in Appendix-M attached hereto.

Miss. Code Ann. Section 47-5-138 (as amended 1992) is set forth in Appendix-N attached hereto.

Miss. Code Ann. Section 47-5-139 (as amended 1992) is set forth in Appendix-O attached hereto.

Miss. Code Ann. Section 47-5-142 (as amended 1992) is set

forth in Appendix-P attached hereto.

Miss. Code Ann. Section 47-7-3 (as amended 1993) is set forth in Appendix-Q attached hereto.

Miss. Code Ann. Section 99-19-23 (1972) is set forth in Appendix-R attached hereto.

STATEMENT OF THE CASE

On September 16, 1985, your Petitioner, Harvey F. Garlotte (Garlotte), plead guilty, within the Circuit Court of Lamar County, Mississippi, to three separated charges during the same guilty plea qualification hearing. All three charges were initially prosecuted and begun in Marion County, Mississippi. However, Garlotte's marijuana charge, being Cause No. 4208-2 within the Circuit Court of Marion County, was transferred by change of venue to the Circuit Court of Lamar County, Mississippi, where it was assigned Cause No. 6011-2. Garlotte was charged with murder in the other two cases, being Cause No's 4230-2 and 4231-2 within the Circuit Court of Marion County, Mississippi. At Garlotte's guilty plea hearing in Cause No. 6011-2, on September 16, 1986, within the Circuit Court of Lamar County, Mississippi, he also plead guilty to the two murder charges. No change of venue was made in the murder cases. However, it was agreed by stipulation that those two charges would remain on the docket in the Circuit Court of Marion County, Mississippi, though Garlotte was in fact pleading guilty within the Circuit Court of Lamar County.

Garlotte was sentenced to three years upon his guilty plea in the marijuana case. Upon his guilty pleas to the two murders,

he was sentenced to two life sentences concurrent with each other but, consecutive to the three year sentence imposed in Cause No. 6011-2.

On September 19, 1986, Garlotte was transferred from the county jail to the state penitentiary. Prior to being sent to prison, Garlotte had no knowledge of the workings or technicalities of the law or court procedures; he did not even know that such things as law libraries existed. After being sent to prison and finding out that a law library was available, in late November, 1986, Garlotte was allowed, for the first time, to attend a law library (he had been signing up repeatedly to attend but was not allowed to). Thereafter, he attended every chance he could (though suffering many adverse consequences for asserting and taking advantage of his right to utilize the law library) in an attempt to learn the law and the laws relating to guilty pleas particularly: he had felt since pleading guilty, and prior thereto, that he should not have done so. As noted below, he filed several post conviction proceedings in the state and federal courts, acting **pro se**. He could not afford an attorney and, as can be determined by the fact that he felt compelled to file a second post conviction regarding his marijuana conviction, he filed his first post conviction in that proceeding without having the knowledge of the law that he should have acquired prior thereto. He did what he could and the best he could, on his own.

On September 25, 1986, Garlotte submitted to the Circuit Court of Lamar County, Mississippi, a Motion to Vacate Conviction

seeking that the court allow him to withdraw his guilty plea to the marijuana charge in Cause No. 6011-2. However, though received by the clerk in September, 1986, that motion was not filed until November 3, 1986. That post conviction motion was assigned Cause No. PC-13 (PC-13) and was summarily denied on the same date it was filed, November 3, 1986.

Garlotte filed a timely appeal of the denial of his post conviction in Cause No. PC-13 and that appeal was denied by the Mississippi Supreme Court on August 10, 1988, with rehearing being denied on September 28, 1988. That decision is reported at **Garlotte v. State**, 530 So.2d 693 (MS 1988).

On December 27, 1988, Garlotte submitted to the Mississippi Supreme Court, regarding his marijuana conviction in Cause No. 6011-2, an Application for Leave to Proceed in Trial Court and a second Motion to Vacate Conviction. These were summarily denied without opinion by the Mississippi Supreme Court on January 18, 1989.

On October 6, 1989, as soon as he possibly could (at the time he had matters pending in two different courts regarding his murder convictions, and conditions of confinement that required his time and attention) Garlotte submitted to the United States District Court for the Southern District of Mississippi, Hattiesburg Division, his federal habeas corpus challenging the legality of his guilty plea to the marijuana charge. That case was assigned Case No. H89-0187. The district court had jurisdiction to entertain the habeas proceedings pursuant to Title 28 U.S.C.A. §§2241 and 2254.

On August 29, 1990, the U.S. magistrate judge issued a Report and Recommendation recommending that Garlotte's habeas proceedings be dismissed for failure to exhaust state remedies. (Both the respondent and magistrate judge overlooked Garlotte's second state post conviction proceedings which contained the allegedly unexhausted issues. The respondent later conceded that Garlotte had in fact exhausted his state remedies regarding each of the issues he presented within his federal habeas petition. See Appendices-E and F attached hereto.) On June 25, 1991, the district court judge remanded the matter to the magistrate judge for reconsideration. On February 13, 1992, (after the case was reassigned) a second Report and Recommendation was issued and the magistrate judge then recommended that the petition be denied. See Appendix-B. On June 3, 1992, the district court judge adopted the magistrate judge's Report and Recommendation of February 13, 1992, and entered a final judgment. See Appendices-C and D. Garlotte then petitioned the district court for a certificate of probable cause. The district court refused to issue the certificate and Garlotte then petitioned a circuit judge of the United States Court of Appeals for the Fifth Circuit for a certificate of probable cause. On March 3, 1994, the Honorable John M. Duhe, Jr., Circuit Court Judge, granted Garlotte's request for a certificate of probable cause, and ordered Fordice to file a brief on the issues. The Order granting the certificate of probable cause is copied in Appendix-G attached hereto. The case in the United States Court of Appeals for the Fifth Circuit was styled **Garlotte v. Fordice**,

and assigned Case No. 92-7396

On April 4, 1994, Fordice submitted his "Brief of Respondent-Appellee." Within that brief, Fordice, for the first time, asserted that Garlotte had completed the service of his three year sentence on the marijuana conviction on June 1, 1986. Upon those alleged facts, Fordice, within his brief and for the first time, urged that, because Garlotte had allegedly completed the service of his three year sentence at the time of the filing of his habeas petition in the district court, the district court did not have jurisdiction to entertain Garlotte's habeas petition as he was not "in custody" for the purposes of Title 28 U.S.C.A. §§2241(c) or 2254(a) on the marijuana conviction at the time of the filing of the habeas petition. Fordice based his argument on this Court's interpretation of the "in custody" requirement of Title 28 U.S.C.A. §2254 as expressed in **Maleng v. Cook**, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989).

On May 2, 1994, Garlotte submitted to the court of appeals his "Appellant's Reply Brief." Within that brief Garlotte asserted, **inter alia**, that under the decision of this Court in **Peyton v. Rowe**, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968), decisions of other courts of appeals', the applicable statutes of the State of Mississippi, and the policies and practices of the Mississippi Department of Corrections in calculating sentences, he was in fact, presently and at the time of the filing of the habeas petition, in custody on his marijuana conviction for the purposes of Title 28 U.S.C.A. §§2241 and 2254.

The court of appeals, within its opinion issued August 19,

1994 (Appendix-A), found and held that under this Court's decision in **Maleng, supra**, Garlotte was not "in custody" on his marijuana conviction for the purposes of Title 28 U.S.C.A. §2254 at the time of the filing of his habeas petition in the district court and, therefore, the district court lacked jurisdiction to entertain those proceedings. The appeals court made this decision even though, under Mississippi law and per the policies and practices of the Mississippi Department of Corrections, Garlotte's consecutive sentences are combined for a total aggregate term for the purposes of earned time and parole eligibility, and its acceptance that Garlotte would receive a benefit in the form of being eligible for parole earlier should the marijuana conviction be vacated. **Garlotte v. Fordice**, 29 F.3d, at 218. See Appendices-K through V.

Pursuant to Mississippi law, if Garlotte were successful in his challenge to his marijuana conviction, his concurrent life sentences would begin on June 6, 1985, the day he turned himself in and was arrested on the murder charges, rather than March 1, 1986. See Appendix-R, Miss. Code Ann. 1972, §99-19-23 and **Garlotte v. Fordice**, 29 F.3d, at 217. Garlotte must serve ten years on the life sentence(s) before becoming eligible for parole. See Appendix-Q.

Under Mississippi law, an "offender under two (2) or more consecutive sentences shall be allowed commutation based upon the total term of the sentences." Miss. Code Ann. (as amended 1986), §47-5-139(3) (Appendix-L), and as amended 1993, §47-5-139(2). See, also, Appendix-S. Hence, Garlotte's three year sentence in

the case **sub judice** becomes a part of his life sentence(s) which he is presently serving. This was the law at the time Garlotte was sentenced in 1985 and remains the law. See note "Sources" in Appendix-L.

Garlotte is presently eligible for parole on March 1, 1996. **Garlotte v. Fordice**, 29 F.3d, at 217. If he were successful in his challenge to his marijuana conviction, he would be eligible for parole on June 6, 1995, after serving 10 years on his life sentence(s). Miss. Code Ann. 1972, §47-7-3. This was the law when Garlotte was sentenced and remains to be the law on that issue.

In 1992 the Mississippi Legislature amended the Mississippi Earned Time Statutes. See Appendix-N. Based upon those amended statutes, the Mississippi Department of Corrections, in November 1992, recalculated Garlotte's earned time on his three year sentence for the marijuana conviction in the case **sub judice**. This action belies Resondent Fordice's argument that Garlotte had completely served and discharged from his marijuana conviction on June 1, 1986. See Appendices-T and V. When the Mississippi Department of Corrections recomputed Garlotte's three year sentence pursuant to the change in the laws in 1992, they credited him with six months of meritorious earned time and subtracted that additional six months from his parole eligibility date (though mistakenly doing so as only two months could by law be subtracted form the one year mandatory service before being eligible for parole. See Appendices-O and Q.). Compare the time periods stated within Appendices-T, U and V.

If Garlotte, as Respondent Fordice contends, had completed the service of and discharged from his sentence on his marijuana conviction on June 1, 1986, why was the calculation of that sentence affecting his parole eligibility and earned time in 1992 when there was a change in the laws? Until the earned time and parole laws changed in 1992, Garlotte was eligible for parole on May 1, 1996. See Appendix-U. When the Mississippi Department of Corrections recalculated Garlotte's sentences in 1992 as a result of those changes in the law, they determined he was now eligible for parole on December 2, 1995, (though mistakenly because, by law, Garlotte cannot be eligible for parole until March 1, 1996, at the earliest, under his present sentences). See Appendix-T.

As noted above, Garlotte has been continuously confined on consecutive sentences since June 6, 1985, under Mississippi law those sentences are commuted for a total aggregate term, and the first of those consecutive sentences, though technically completed, continues to effect the total term of his present incarceration, his receipt of earned time and his parole eligibility date.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for four reasons: (1) The petition presents an issue resolved by implication by this Court in **Peyton, supra**, but not specifically and unequovically decided by the Court; (2) The opinion below directly conflicts with the decisions of other courts of appeals' on the same issue; (3) The decision below, by implication, conflicts with the prior decisions of this Court; and (4) The petition presents a

substantial federal question that has not previously been specifically and unequivocally decided by this Court but should be.

1.

This Court, in **Peyton v. Rowe**, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968) considered the question of whether prisoners serving consecutive sentences could challenge, on federal habeas corpus, the underlying convictions the sentences for which they had not yet begun to serve. In applying and interpreting the custody requirements of 28 U.S.C. §§2241 and 2254, this Court stated:

> "However, in common understanding 'custody' comprehends respondents' status for the entire duration of their imprisonment. Practically speaking, Rowe is in custody for 50 years, or for the aggregate of his 30- and 20-year sentences. For purposes of parole eligibility, under Virginia law he is incarcerated for 50 years. Va. Code Ann. §53-251 (1967); see n. 3, supra. Nothing on the face of §2241 militates against an interpretation which views Rowe and Thacker as being 'in custody' under the aggregate of the consecutive sentences imposed on them. Under that interpretation, they are 'in custody in violation of the Constitution' if any consecutive sentence they are scheduled to serve was imposed as the result of a deprivation of constitutional rights. This approach to the statute is consistent with the canon of construction that remedial statutes should be liberally construed."

Peyton, 88 S.Ct. at 1549. In overruling its prior decision on the issue in **McNally v. Hill**, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934), the Court went on to say that, "[w]e overrule **McNally** and hold that a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of §2241(c)(3). This interpretation is consistent with the statutory language and

with the purpose of the writ of habeas corpus in the federal courts." **Peyton**, 88 S.Ct. at 1556.

In the case **sub judice**, like Rowe and Thacker, Garlotte is serving consecutive sentences. See Appendices A and T - V. Also, like Rowe and Thacker, Garlotte's consecutive sentences are combined for a total aggregate term. See Appendices L, O and S. And, like Rowe and Thacker, if Garlotte were to be succesful in his challenge to the conviction in the case **sub judice**, his parole eligibility date would be advanced. See Appendices A, Q, R, S and T - V.

Under this Court's decision in **Peyton, supra**, though the situation is reversed, Garlotte is "in custody" for the purposes of 28 U.S.C. §§2241 and 2254, since an offender "serving consecutive sentences is 'in custody' under any one of them." **Peyton**, 88 S.Ct. at 1556.

Thus, in **Peyton** this Court implicitly held that even if the offender has technically completed the service of the first of his consecutive sentences, he is nevertheless still "in custody" for the purposes of §§2241 and 2254.

2.

In the case **sub judice** the Court of Appeals held that an offender serving consecutive sentences can never challenge the legality of the first of those sentences if he has technically completed the service of that sentence, as he is not in custody under that sentence/conviction to meet the "in custody" requirements of 28 U.S.C. §§2241 or 2254. See Appendix A.

The U.S. Court of Appeals for the Fifth Circuit reached its decision in **Garlotte v. Fordice**, 39 F.3d 216 (5th 1994) by relying upon this Court's decision in **Maleng v. Cook**, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). "The question presented [in **Maleng** was] whether a habeas petitioner remains 'in custody' under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance sentences imposed for any subsequent crimes of which he is convicted." The Court answered that question in the negative. **Id.**, 109 S.Ct. at 1926.

The U.S. Court of Appeals for the Eighth Circuit has also, relying upon **Maleng**, determined that an offender serving consecutive sentences in not "in custody" on the first of those sentences if it has technically expired. **Allen v. Dowd**, 964 F.2d 745 (8th Cir. 1992).

Nevertheless, the courts in the following cases have held that **Maleng** is not controlling when consecutive sentences are at issue, but that **Peyton v. Rowe, supra**, is. In **Bernard v. Garraghty**, 934 F.2d 52 (4th Cir. 1991), the "appeal raise[d] the issue of whether a prisoner serving the second of two consecutive state sentences is 'in custody' for purposes of bringing a federal habeas corpus challenge against the first sentence already served." **Id.**, at 53. In answering that question the **Bernard** Court stated:

> "We find that **Peyton** and not **Maleng** controls this case. **Peyton** sets forth quite clearly the law concerning the custody status of prisoners who are serving consecutive sentences: for such prisoners, custody for habeas purposes is defined not by any one particular sentence but by the

> aggregate of the sentences. 391 U.S. at 64, 88 S.Ct. at 1554-55. **Maleng** does not affect **Peyton** because in **Maleng** the Court did not address consecutive sentences, nor did it attempt to define when the first sentence is discharged."

Bernard, 934 F.2d at 54.

Also, in **Bernard**, as in the case **sub judice**, as additional support for its holding the court acknowledged that under Virginia law as exist presently and when **Peyton** was before this Court, a persons consecutive sentences are commuted to a total combined, or aggregate term, for parole eligibility purposes. And, that under such statutes a person is not actually serving two separate periods, or sentences, but one total and combined period. **Bernard**, 934 F.2d at 55. Garlotte's sentences, under Mississippi Law, and for parole and earned time purposes, are considered as one period of time. See Appendices L, O, Q, S, T - V. Additionally, as noted **supra** at pp. 9-10, as late as 1992 Garlotte's earned time and parole eligibility dates, in relation to the conviction in the case **sub judice**, were being recalculated and realigned due to a 1992 change in the Mississippi earned time statutes.

In **Fawcett v. Bablitch**, 926 F.2d 617, 618 (7th Cir. 1992), the Court also found that **Peyton** and not **Maleng** was controlling where consecutive sentences were at issue and stated that "a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of collateral attack." See, also, **Fortner v. Singletary**, 797 F. Supp. 951, 954 (M.D. FL 1992).

In **Fox v. Kelso**, 911 F.2d 563, 568 (11th Cir. 1990), the court held that **Maleng** is not controlling where the offender

will receive credit against his current sentences for the time served on the prior sentence(s). A similar result was reached in **Harrison v. State of Indiana**, 597 F.2d 115, 117 (7th Cir. 1979), and in that case the Court determined that **Peyton** was applicable and controlling when the factual situations were reversed, that is, where the offender challenged a consecutive sentence he had, technically, already served, rather than one to be served in the future.

As noted, there is a conflict and no little amount of confusion among the Circuit Courts of Appeals regarding the "in custody" requirement of 28 U.S.C. §§2241 and 2254 when consecutive sentences are at issue and, concerning the application of this Court's decisions in **Peyton and Maleng, supra**.

3.

The court's decision in **Garlotte v. Fordice**, 29 F.3d 216 (5th Cir. 1994), is in conflict with this Court's holding in **Peyton, supra**, wherein this Court held "that a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of §2241(c)(3)," and, by implication, §2254.

4.

As can be ascertained by the voluminous case law regarding the interpretation of "in custody," some of which is noted hereinabove, there can be no doubt that the case **sub judice** presents a substantial federal question. Though seemingly layed to rest and answered in the affirmative in **Peyton, supra**, the question was not specifically and unequovically, according to the

court in **Garlotte v. Fordice, supra**, decided and determined by this Court previously, **Peyton**, notwithstanding.

5.

The United States Congress has not deemed it advisable to amend either 28 U.S.C. §§2241 or 2254 in the 36 years since this Court's decision in **Peyton, supra**, was rendered. This Court has stated that "when [its] earlier opinion gives a statutory provision concrete meaning, which Congress elects not to amend during the ensuing [years], [its] duty to respect Congress' work product is strikingly similar to the duty of other federal courts to respect," the work product of this Court. **Rodriguez De Quijas v. Shearson/American Exp., Inc.**, 490 U.S. 477, 109 S.Ct. 1917, 1923, 104 L.Ed.2d 526 (1989).

6.

In **Garlotte v. Fordice, supra**, the court of appeals chose not to follow this Court's decision in **Peyton, supra**, which had direct application to the case **sub judice**. In doing so the court of appeals erred and effectively overruled this Court's decision in **Peyton**. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the perogative of overruling its own decisions." **Rodriguez De Quizas**, 109 S.Ct. at 1921-22.

7.

Under the doctrine of **stare decisis** this Court's holding in **Peyton, supra**, that for the purposes of 28 U.S.C. §§2241 and 2254

an offender "serving consecutive sentences is 'in custody' under any one of them" (**Peyton**, 88 S.Ct. at 1556) is the controlling rule of law regarding the issues herein and should be applied to Garlotte's case to find that the district court and court of appeals did and does have jurisdiction to entertain his federal habeas corpus proceedings in the case **sub judice**.

In circumstances such as these regarding the Court's decision in **Peyton, supra**, the Court will follow the normal presumption of **stare decisis**. **Cf. N.L.R.B. v. International Longshoreman's Ass'n**, 473 U.S. 61, 105 S.Ct. 3045, 3058, 87 L.Ed.2d 47 (1985), and cases cited therein.

8.

To find that Garlotte is not "in custody" for the purposes of 28 U.S.C. §§2241 or 2254 regarding his marijuana conviction in the case **sub judice** would deny and deprive him of his rights and privileges as guaranteed under the United States Constitution, Article IV, §2, cl. 1, and Amendment 14, providing for the equal protection of the laws.

It makes no sense to say that if Garlotte's murder conviction sentences were "enhanced" by the marijuana conviction he could challenge his marijuana conviction, vicariously, by challenging his murder convictions. See **Garlotte v. Fordice**, 29 F.3d 216 (5th Cir. 1994), and **Maleng v. Cook**, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989).

Garlotte was required to exhaust his state remedies in challenging his conviction in the case **sub judice before** he could proceed into federal court. 28 U.S.C. 2254(b), **Murray v.**

Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). To find that he is no longer "in custody" because he did exactly what the law required of him, would be a violation of his rights to due process and equal protection.

Garlotte's sentences on his murder convictions are delayed from beginning for approximately nine months, for parole consideration purposes, and approximately 12-16 months otherwise. As such, this is surely as significant as if the murder sentence(s) had been enhanced by the marijuana conviction and is not merely a "collateral consequence" of the marijuana conviction as the court of appeals would have it. **Garlotte**, 29 F.3d at 218. Surely beginning the service of a sentence a year earlier is a "positive and demonstrable" nexus between sentences to justify being considered "in custody." **Id.** **Willis v. Collins**, 989 F.2d 187 (5th Cir. 1993). To find otherwise would be an arbitrary distinction in violation of Garlotte's rights to due process and equal protection.

9.

This Court will grant certiorari to review its own prior decisions, and when clarification of a rule of law is feasible. **United States v. Ross**, 456 U.S. 798, 102 S.Ct. 2157, 2162, 72 L.Ed.2d 572 (1982).

This Court will grant certiorari when there is a conflict between the courts of appeals on the same issue. **Immigration and Naturalization Service v. Errico**, 385 U.S. 214, 87 S.Ct. 473, 475, 17 L.Ed.2d 318 (1966), and Rule 10.1(a), Rules of The Supreme Court.

This Court will grant certiorari when a court of appeals has decided an important question of federal law that has not been specifically and unequovically decided by this Court, but should be, and when a court of appeals has decided a question of federal law in a way that conflicts with the applicable decisions of this Court. Rule 10.1(c), Rules of The Supreme Court.

Garlotte submits that this Court should grant certiorari in these proceedings to specifically and explicitly rule that an offender serving consecutive sentences is "in custody" on the first of those sentences even if it has technically expired, and, further, to resolve the confusion arising from this Court's decisions in the **Peyton** and **Maleng** cases, **supra**, and the confusion and conflicts among and between the courts of appeals on the issue.

CONCLUSION

For the reasons stated hereinabove, Garlotte respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the court of appeals in these proceedings.

Respectfully submitted this the 3rd day of November, 1994.

Harvey F. Garlotte

Harvey E. Garlotte, **pro se**
X60710, SMCI U-14
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Leakesville, MS 39451

APPENDIX—Continued

The introducing broker was not included in the arbitration clause between Taylor and Prudential; because of that, it is reasonable to draw the inference that the parties did *not* intend for the defendants, the introductory firm (IAI) and its agent (Goldberg), to be a beneficiary of the arbitration clause. The plain meaning of the chosen language is clear. The defendants cannot compel arbitration.

III. CONCLUSION

For the reasons set forth above, IAI and Goldberg's motion to stay proceedings and compel arbitration, or, alternatively, to dismiss, is denied. An order to that effect will issue concurrently with this memorandum opinion.

SIGNED this 14th day of June, 1993.

/s/ William Wayne Justice
William Wayne Justice
United States District Judge

Harvey F. GARLOTTE, Petitioner-Appellant,

v.

Kirk FORDICE, Governor, Respondent-Appellee.

No. 92-7396
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 19, 1994.

Petitioner, who had received consecutive sentences for possession of marijuana with intent to deliver and for murder, filed habeas corpus petition challenging marijuana conviction. The United States District Court for the Southern District of Mississippi, Charles W. Pickering, Sr., J., dismissed petition, and petitioner appealed. The Court of Appeals held that petitioner was no longer "in custody" on marijuana conviction, and thus there was no subject matter jurisdiction over his petition.

Affirmed.

1. Habeas Corpus ⇐816

Challenge to subject matter jurisdiction in habeas proceeding could be raised for first time on appeal, because it could not be waived. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇐252

Federal district courts lack subject matter jurisdiction to entertain habeas actions if, at time habeas petition is filed, petitioner is not "in custody" under conviction or sentence which petition attacks. 28 U.S.C.A. § 2254.

3. Habeas Corpus ⇐253

Petitioner who received consecutive sentences for possession of marijuana with intent to deliver and for murder was not "in custody" under marijuana conviction, and district court lacked subject matter jurisdiction over petition for habeas corpus relief challenging that conviction, where defendant had been ordered to serve marijuana sentence first, he filed habeas petition after he was discharged from marijuana conviction, and marijuana conviction was not used to enhance life sentences imposed for murder; it was not enough that expired sentence delayed time for which petitioner could receive credit for time served on current sentence or that his parole consideration date was delayed by expired sentence. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

Harvey F. Garlotte, pro se.

Jo Anne M. McLeod, Sp. Asst. Atty. Gen., Mike Moore, Atty. Gen., Jackson, MS, for appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before SMITH, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

Petitioner Harvey F. Garlotte ("Garlotte") brings a *habeas corpus* action pursuant to 28 U.S.C. § 2254, challenging a 1985 state conviction for possession of marijuana. The district court, adopting the magistrate judge's Report and Recommendation, dismissed the petition for failure to exhaust state remedies without requiring the respondent to file an answer. We granted Garlotte's request for a Certificate of Probable Cause, ordering Respondent Kirk Fordice ("Fordice") to brief the issue whether the district court prematurely dismissed Garlotte's petition without requiring an answer or conducting an evidentiary hearing. Concluding that under recent United States Supreme Court precedent Garlotte was not "in custody" for purposes of § 2254, we affirm the district court's dismissal of the petition, but on the separate ground of lack of jurisdiction pursuant to 28 U.S.C. § 2254.

FACTS AND PROCEDURAL HISTORY

In 1985, Garlotte pleaded guilty to one count of possession with intent to deliver or sell one ounce or less of marijuana and was sentenced to three years imprisonment. On the same day he pleaded guilty to two counts of murder and received two life sentences, which the court ordered to run concurrently. The court also ordered that the concurrent life sentences were to run "consecutive, and after" the three year marijuana conviction. Garlotte did not appeal his marijuana conviction, and his two state post-conviction motions were denied. He is currently eligible for parole consideration on March 1, 1996.

In 1989, Garlotte filed a federal petition for *habeas corpus* relief challenging the 1985 marijuana conviction. Fordice filed a motion to dismiss for failure to exhaust state habeas remedies, and the magistrate judge recommended that the petition be dismissed with prejudice. The district court remanded the matter to the magistrate for reconsideration.

On remand, the magistrate recommended dismissing the petition without requiring Fordice to file an answer, concluding that although it was unclear whether Garlotte had exhausted his state remedies, even if they were unexhausted the requirement should be waived because exhaustion would be futile. After reviewing the magistrate's Report and Recommendation, the district court adopted it, dismissed the petition, and denied Garlotte's request for a Certificate of Probable Cause.

DISCUSSION

[1] For the first time on appeal, Fordice argues Garlotte's habeas petition should be dismissed for lack of subject matter jurisdiction because he is not "in custody" within the meaning of 28 U.S.C. § 2254. A challenge to subject matter jurisdiction may be raised for the first time on appeal because it may not be waived. *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1180 (5th Cir.1987), *cert. denied*, 493 U.S. 851, 110 S.Ct. 150, 107 L.Ed.2d 108 (1989). Therefore, we address the question of whether Garlotte is "in custody" under the 1985 marijuana conviction.

[2-3] Federal district courts lack subject matter jurisdiction to entertain § 2254 actions if, at the time the petition is filed, the petitioner is not "in custody" under the conviction or sentence which the petition attacks. *Maleng v. Cook*, 490 U.S. 488, 491, 109 S.Ct. 1923, 1925, 104 L.Ed.2d 540 (1989); see also *Hendrix v. Lynaugh*, 888 F.2d 336 (5th Cir. 1989). Fordice argues that under *Maleng*, Garlotte is not "in custody" because his three year sentence for the marijuana conviction was fully expired before he filed his habeas petition with the district court. Specifically, Fordice contends that according to Garlotte's records at the Mississippi Department of Corrections, he was discharged from the marijuana conviction on June 1, 1986. He did not file his petition for habeas relief in federal court until 1989, after he was already serving time for the two concurrent life sentences for murder. Therefore, because the marijuana conviction he now attacks was not used for enhancement purposes for the concurrent life sentences for murder, and because the marijuana conviction is fully expired, Garlotte is not "in custody" for purposes of § 2254.

Garlotte does not challenge Fordice's contention that his three year marijuana sentence has expired, but argues instead that the Supreme Court's decision in *Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968), holding that a prisoner serving consecutive sentences is "in custody" under any one of the sentences, controls this case. Garlotte further argues that there exists a "positive and demonstrable" nexus between his current custody under the murder sentences and the prior marijuana conviction such that his challenge meets the jurisdictional requirements of § 2254. *Willis v. Collins*, 989 F.2d 187 (5th Cir.1993), quoting *Young v. Lynaugh*, 821 F.2d 1133, 1137 (5th Cir.1987), *cert. denied*, 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987), and *cert. denied*, 484 U.S. 1071, 108 S.Ct. 1040, 98 L.Ed.2d 1004 (1988). Specifically, he contends that but for his marijuana conviction, he would have been eligible for parole consideration on June 5, 1995, instead of March 1, 1996.

This Court has held that a petitioner can challenge a fully expired sentence if the expired sentence delayed the time for which the petitioner could receive credit for time served on the current sentence. *Cappetta v. Wainwright*, 406 F.2d 1238, 1239 (5th Cir.), *cert. denied*, 396 U.S. 846, 90 S.Ct. 55, 24 L.Ed.2d 96 (1969). Since *Cappetta*, however, the Supreme Court stated in *Maleng*:

> We have never held, however, that a habeas petitioner may be "in custody" under a conviction when the sentence imposed for that conviction has *fully expired* at the time the petition is filed.

Maleng, 490 U.S. at 491, 109 S.Ct. at 1925 (emphasis in original). Therefore, to the extent that the Supreme Court's decision in *Maleng* is in conflict with this Court's decision in *Cappetta*, we now follow the rule established by *Maleng*.

In *Peyton*, the Supreme Court held that a petitioner who was serving consecutive sentences imposed by the state court is "in custody" under any one of those sentences. *Peyton*, 391 U.S. at 67, 88 S.Ct. at 1556. Unlike Garlotte, however, the petitioners in *Peyton* were challenging a sentence they had not yet begun to serve. Garlotte attempts only to challenge a sentence that is "fully expired" under the definition established by the Supreme Court in *Maleng*. Therefore, Garlotte's challenge to his "fully expired" marijuana conviction is not controlled by the Supreme Court's decision in *Peyton* because he is not attempting to challenge a sentence he has not yet begun to serve.

As for Garlotte's contention that because his parole consideration date has been delayed by the marijuana conviction a nexus exists between the marijuana conviction and the murder conviction, we find that this argument too must fail. As the Supreme Court stated in *Maleng*:

> [O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual "in custody" for the purposes of a habeas attack upon it.

Maleng, 490 U.S. at 492, 109 S.Ct. at 1926. Because Garlotte's parole delay merely constitutes a collateral consequence of his marijuana conviction, he has failed to allege a "positive and demonstrable" nexus between the marijuana conviction and the murder sentences he is now serving in order to meet the requirements of the *Maleng* exception established by this Court in *Willis*. Having found that Garlotte is not "in custody" for purposes of subject matter jurisdiction, we decline to address the other issues he raises in his petition. Accordingly, we AFFIRM the district court's dismissal, but on the separate ground of the district court's lack of jurisdiction pursuant to 28 U.S.C. § 2254.

WEST KEY NUMBER SYSTEM

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

HARVEY F. GARLOTTE — PETITIONEI

VS. — CIVIL ACTION NO. H89-0187(P)

RAY MABUS, ET AL — RESPONDENTS

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

Harvey Floyd Garlotte pled guilty to the crime of possession of less that one ounce of marijuana with intent to deliver or sell in the Circuit Court of Lamar County, Mississippi on September 16, 1985. He was previously arraigned for the crime December 10, 1984, in Marion County, and his case was assigned to Lamar County on his own motion. Garlotte also pled guilty to two counts of murder on the same day, but he does not now challenge these convictions herein. Garlotte was sentenced to a three-year term in the custody of the Mississippi Department of Corrections for the crime of possession of marijuana with intent to deliver or sell.

Garlotte appealed his conviction directly to the Mississippi Supreme Court, and that court affirmed in Garlotte v. State, 530 So.2d 693 (Miss. 1988). After filing several more unsuccessful post-conviction motions, Garlotte then filed his writ for habeas corpus with this court. The State filed its Motion to Dismiss for Failure to Exhaust on November 20, 1989, and a Report and Recommendation was entered by the Magistrate on August 30, 1990, recommending dismissal. The District Judge entered an Order on

AO 72A
(Rev. 8/82)

June 27, 1991, remanding the case to the Magistrate for reconsideration.

Although it is unclear whether or not Garlotte has exhausted his state court remedies on all of his alleged grounds for relief, it appears that a return to the state courts may prove futile. Thus, it is our recommendation that the exhaustion requirement be waived and that Garlotte's petition be considered on the merits.

Garlotte alleges that his conviction is "illegal and void" based on the following grounds which entitle him to relief:

> 1. The Trial Court erred in accepting Petitioner's guilt plea and did not adequately establish and ensure that Petitioner's plea was voluntary, intelligent and knowing.
>
> 2. Petitioner was denied effective assistance of counsel.
>
> 3. The trial court lacked jurisdiction to entertain and/or accept the Petitioner's guilty plea.
>
> 4. Petitioner was subjected to double jeopardy.
>
> 5. Petitioner's sentence was unusual and disproportionate.
>
> 6. Petitioner's guilty plea was the product of undue influence/coercion and/or misleading information.
>
> 7. Petitioner was incompetent at the time of the guilty plea.
>
> 8. Petitioner's guilty plea was not knowing, intelligent and voluntary.[1]
>
> 9. Petitioner was denied full and fair consideration of his *pro se* pleadings by the Mississippi Courts.

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[1] This ground is essentially identical to Ground No. 1.

AO 72A
(Rev. 8/82)

(sic)

Garlotte's *primary* attack on his conviction is his allegation that his guilty plea was unlawful for numerous different reasons. Ground Nos. 1, 2, 3, 4, 6, 7, and 8 are all related to the lawfulness of Garlotte's guilty plea, and we shall consider the merits of these grounds as a whole.

We have examined the transcript from the lower court's hearing whereby Garlotte entered his plea of guilty to this crime. We agree with the Mississippi Supreme Court's statement in the direct appeal of this case that "Judge Eubanks conducts one of the most thorough and explicit plea hearings this Court has had the opportunity to read....The issues raised by Garlotte are without merit, totally refuted by the lengthy and explicit record of the guilty plea." Garlotte, 530 So.2d at 694.

Judge Eubanks explained in detail to Garlotte his rights to plead not guilty and have a trial; he questioned Garlotte thoroughly as to whether the plea was freely and voluntarily given and whether or not anyone had coerced or pressured him. As to competency, when Garlotte mentioned his past alcohol and drug problems, Judge Eubanks questioned him in detail as to how long it had been since he had used alcohol and whether it was out of his system or still affecting his judgment. Garlotte confirmed that he was no longer under the influence as he had not used any drugs or alcohol in three months. The court interrogated him regarding his educational background, determining that he had completed his high school degree (by GED) and could read and write. The Judge had the

D 72A
ev. 8/82)

opportunity to examine the demeanor of Garlotte and could form an opinion as to whether he was competent; the record certainly confirms the judge's decision.

The record indicates that the Judge *affirmatively* found that Garlotte was competent, that the plea was freely and voluntarily given, that no coercion was involved, and that Garlotte understood his rights.

A plea of "guilty" to a charge has a profound effect on subsequent events in a criminal proceeding. In Boykin v. Alabama, 395 U.S. 238, 242 (1969), the Supreme Court held that a guilty plea to a criminal charge is "more than admission of conduct; it is a conviction." See also, Swift v. Lynn, 870 F.2d 1039, 1041 (5th Cir. 1989); Long v. McCotter, 792 F.2d 1338, 1345 (5th Cir. 1986). Such a plea waives several federal constitutional rights, such as the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Long, 792 F.2d at 1345. A valid guilty plea waives all nonjurisdictional defects preceding the plea. United States v. Jennings, 891 F.2d 93, 95 (5th Cir. 1989); See also, United States v. Harper, 901 F.2d 471, (5th Cir. 1990). In Tollett v. Henderson, 411 U.S. 258 (1972), the court held that:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice

O 72A
ev. 8/82)

57

he received from counsel was not within the standards set forth in McMann.

Id. at 267 (*citing* McMann v. Richardson, 397 U.S. 759 (1970); Cook v. Lynaugh, 821 F.2d 1072, 1075 (5th Cir. 1987).[2]

The United States Supreme Court established in Boykin that as a matter of due process the court record in criminal proceedings must affirmatively disclose that a guilty plea was entered voluntarily and intelligently. See also, Gillard v. Scroggy, 847 F.2d 1141, 1143 (5th Cir. 1988). In Boykin, the court reversed a criminal conviction based upon a guilty plea where the record was "wholly silent" on whether the judge asked the defendant any questions or whether the defendant ever addressed the court. Boykin, 395 U.S. at 240. The rule governing acceptance of guilty pleas has three core concerns: the plea must be free from coercion, the accused must understand the nature of the charges against him, and the accused must know the direct consequences of his guilty plea. United States v. Stumpf, 900 F.2d 842, 844 (5th Cir. 1990). The lower court's interrogation of Garlotte, along with Garlotte's responses, clearly show that these criteria were met.

The court must advise the defendant of the maximum sentence he can receive, and the transcript affirmatively shows that this was done in Garlotte's hearing. United States v. Daniel, 830 F.2d 46,

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[2]The court, in reaching its conclusion in Tollett, relied on a trilogy of cases decided in 1970. See Brady v. U.S., 397 U.S. 742 (1970) (guilty pleas allegedly entered to avoid possibility of death penalty); McMann v. Richardson, 397 U.S. 759 (1970) (confession allegedly coerced); Parker v. North Carolina, 397 U.S. 790 (1970) (guilty plea allegedly entered to avoid possibility of death penalty).

AO 72A
(Rev. 8/82)

47 (5th Cir. 1987). However, the Supreme Court held in Hill v. Lockhart, 474 U.S. 52, 55-56 (1985), that in order for a guilty plea to be valid and binding, a trial court is not required to inform a criminal defendant of collateral consequences that might result from the conviction based on the guilty plea. See also, Johnson v. Puckett, 930 F.2d 445 (5th Cir. 1991). In Hill, the court affirmed that the procedures for ensuring that guilty pleas are knowingly and intelligently entered are outlined in Rule 11(c), Federal Rules of Criminal Procedures, and the court stated that the Constitution does not require the states to inform defendants about collateral matters such as parole eligibility. Id. Furthermore, a defendant who has been advised of the maximum prison term he might receive is fully aware of the consequences of his guilty plea. Barbee v. Ruth, 678 F.2d 634 (5th Cir. 1982). Letter perfect compliance with the rule concerning acceptance of guilty pleas is not demanded. Stumpf, supra, at 844 *citing* United States v. Corbett, 742 F.2d 173 (5th Cir. 1984).

The record of the guilty plea hearing affirmatively discloses that Garlotte's plea was voluntarily and intelligently made as required by Boykin. Many of the complaints Garlotte makes regarding his plea were waived by him due to the plea itself under the foregoing law. It is our opinion that all of the grounds alleged by Garlotte regarding his competency and the voluntariness of the plea are without merit.

Garlotte also attacks his guilty plea by alleging in Ground No. 3 that the trial court had no jurisdiction to entertain his

AO 72A
(Rev. 8/82)

plea due to the invalidity of the indictment. He concludes (without a supporting factual basis) that the indictment was "detained in a deceitful and malicious manner"; the indictment was not signed by the circuit clerk; the grand jury was not properly empaneled; the indictment was "falsified and altered by the district attorney without leave of court"; the grand jury "was not charged concerning the law in relation to the facts"; the grand jury "was not charged with its duties and obligations as an impartial and unbiased judicial body as required by law"; and, the indictment "did not reflect on its face the true weight of the marijuana".

The sufficiency of a state indictment is not a matter for federal habeas corpus relief unless it can be shown that the indictment is so defective that the convicting court had no jurisdiction. Alexander v. McCotter, 775 F.2d 595, 598 (5th Cir. 1985) *citing* Liner v. Phelps, 731 F.2d 1201, 1203 (5th Cir. 1984); Johnson v. Puckett, 930 F.2d 445 (5th Cir. 1991). For an indictment to be "fatally defective," no circumstances can exist under which a valid conviction could result from the facts provable under the indictment with state law providing the reference point for determining an indictment's sufficiency. Johnson, 930 at 447; Johnson v. Estelle, 704 F.2d 232, 236 (5th Cir. 1983) *cert. denied*, 465 U.S. 1009, 104 S.Ct. 1006, 79 L.Ed.2d 237 (1984). However, if the question of the sufficiency of the indictment is presented to the highest state court of appeals, then consideration of the question is foreclosed in federal habeas corpus proceedings. Liner

D 72A
(Rev. 8/82)

60

v. Phelps, 731 F.2d at 1203. Furthermore, in Alexander v. McCotter, supra, the United States Court of Appeals for the Fifth Circuit held that:

> An indictment is sufficient if it (1) contains the elements of the offense charged and fairly informs the defendant of the charge against him and (2) enables him to plead an acquittal or conviction and bar a future prosecution for the same offense.

Alexander, 775 F.2d at 599, *citing* United States v. Montemayor, 703 F.2d 109, 117 (5th Cir. 1983).

In Mississippi, all questions regarding the sufficiency of an indictment are determined by reference to Rule 2.05, Uniform Criminal Rules of Circuit Court Practice. Thames v. State, 454 So.2d 486, 487 (Miss. 1984). Also, an indictment which tracks the statutory language is generally sufficient to inform the accused of the charge against him. Cantrell v. State, 507 So.2d 325, 329 (Miss. 1987); Cummins v. State, 515 So.2d 869, 872 (Miss. 1987); Hickombottom v. State, 409 So.2d 1337, 1338 (Miss. 1982).

We have reviewed the allegations regarding the indictment in this matter and find that Garlotte's indictment was not so defective under the above discussed law to deprive the convicting court of jurisdiction over the cause. Some of Garlotte's allegations are merely conclusory in nature and are without a factual basis.

Garlotte alleges that he had previously pled guilty to the marijuana possession charge in city court and that the instant conviction violated the Double Jeopardy Clause of the United States Constitution. The Double Jeopardy Clause provides that no person

O 72A
ev. 8/82)

shall "be subject for the same offense to be twice put in jeopardy of life or limb." U. S. Constitution, Article V. It protects against three different evils: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. North Carolina v. Pearce, 359 U.S. 711, 717 (1969). We find Garlotte's argument on this ground to be without merit, as he offers no supporting facts to validate his conclusion that the two guilty pleas were for the same offense. Further, his guilty plea conviction in this case may have waived any such assertion.

Garlotte also argues in his Ground No. 2 that he was denied effective assistance of counsel. We point out that the transcript reflects the following testimony of Judge Eubanks and Garlotte:

> Q. Now, Mr. Bubba Holder here is your attorney?
> A. Yes, sir.
>
> Q. And he's here in the Courtroom with you, and you have employed him to represent you on these cases?
> A. Yes, sir.
>
> Q. Now, has he discussed this indictment with you?
> A. Yes, sir.
>
> Q. Has he discussed with you what needs to be done to defend you on these cases?
> A. Yes, sir.
>
> Q. All right, did he go over with you what yours rights were on these charges?
> A. I'm not real sure about that one.
>
> Q. Well, I'm going to go over with you again and so you will understand about them before you enter your plea, but he has discussed the cases and what needs to be done to defend you in these cases?

AO 72A (Rev. 8/82)

A. Yes, sir.

Q. And you've discussed those in detail with him?
A. Yes, sir.

Q. And have you given him the information he needs to properly advise you and represent you on these charges?
A. Yes, sir.

Q. All right, you're not holding back any information from him?
A. No, sir.

Q. Now, has he taken sufficient time to go over everything with you?
A. Yes, sir, I believe he has.

Q. Are you satisfied with his services?
A. Yes, sir.

Q. Do you know of anything else that you would want him to do to defend you on these three charges?
A. No, sir.

In order to establish effective assistance of counsel with regard to a guilty plea, Hill v. Lockhart, 474 U.S. 52, 58 (1958), holds that the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984), must be met. See also, Williams v. Smith, 888 F.2d 28, 30 (5th Cir. 1989); United States v. Green, 882 F.2d 999, 1002 (5th Cir. 1989); United States v. Smith, 844 F.2d 203, 208 (5th Cir. 1988).

In Strickland, the Supreme Court held that before post-conviction relief can be granted for ineffective assistance of counsel, the petitioner must establish: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that this deficient performance prejudiced the defense such that there is a

AO 72A
(Rev. 8/82)

reasonable probability that the outcome of the trial has been undermined and the result would have been different. Strickland, 466 U.S. at 687, 688; See also, United States v. Samples, 897 F.2d 193, 196 (5th Cir. 1990); Lavernia v. Lynaugh, 845 F.2d 493 (5th Cir. 1988); Bridge v. Lynaugh, 838 F.2d 770 (5th Cir. 1988); Thomas v. Lynaugh, 812 F.2d 225 (5th Cir. 1987). Thus, both a deficiency and resulting prejudice must be shown. United States v. Lewis, 786 F.2d 1278, 1281 (5th Cir. 1986). A petitioner's failure to establish both prongs of the Strickland test warrants rejection of his claim. Bates v. Blackburn, 805 F.2d 569, 578 (5th Cir. 1986).

Under the deficiency prong of the Strickland test, a petitioner must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687; see also, Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988). However, the Fifth Circuit has noted the following:

> In determining whether counsel's performance satisfies the requirements of the Sixth Amendment, we must inquire whether, considering all of the circumstances, counsel's performance was reasonable under prevailing professional norms. Judicial scrutiny of counsel's performance must be highly deferential; we must make every effort to eliminate the distorting effects of hindsight and evaluate the conduct from counsel's perspective at the time.

Lavernia v. Lynaugh, 845 F.2d 493, 498 (5th Cir. 1988). In applying the first Strickland criterion, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional competence, or that, under the

circumstances, the challenged action might be considered sound trial strategy. Bridge v. Lynaugh, 838 F.2d at 773 quoting Strickland v. Washington, 466 U.S. at 689; Samples, 897 F.2d at 196. Finally, counsel is given great deference with a strong presumption that counsel has exercised reasonable professional judgment. Martin v. McCotter, 796 F.2d 816, 817 (5th Cir. 1986).

In Hill, supra, the Court stated that in the context of guilty pleas, the first half of the Strickland test is nothing more than a restatement of the standard of attorney competence set forth in Tollett v. Henderson, 411 U.S. 258 (1973) and McMann v. Richardson, 397 U.S. 759 (1970). Both of those decisions hold that where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. See, Hill, 474 U.S. at 56.

The petitioner must also affirmatively prove "prejudice" in order to meet the Strickland test. Byrne v. Butler, 845 F.2d 501, 512 (5th Cir. 1988)(citations omitted). In the guilty plea context, "prejudice" occurs if there is a reasonable probability that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. United States v. Smith, 844 F.2d 203, 209 (5th Cir. 1988); See also, Czere v. Butler, 833 F.2d 59, 63 (5th Cir. 1987); Uresti v. Lynaugh, 821 F.2d 1099, 1101 (5th Cir. 1987). In the instant case, Garlotte has not even alleged that he would have insisted on going to trial.

AO 72A
(Rev. 8/82)

In our opinion, Garlotte has not met his burden of proving ineffective assistance of counsel under the Strickland test and the law as discussed above, and we recommend that no relief be granted on this ground.

Garlotte also alleges in his Ground No. 5 that his three-year sentence, which was the maximum jail sentence allowed under Mississippi law, is unusual and disproportionate. In Rummel v. Estelle, 445 U.S. 263 (1980), the Supreme Court stated that "whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy." Rummel, 445 U.S. at 283, n.27, *citing* Gore v. United States, 357 U.S. 386, 393 (1958); see also, Hutto v. Davis, 454 U.S. 370, 374 (1982).

Moreover, the Supreme Court has held that a reviewing court should not consider the severity of a sentence that has been set within statutory limits, particularly on habeas corpus review. Townsend v. Burke, 334 U.S. 736, 741 (1948). The Fifth Circuit has stated, that "while not reviewing the severity of a sentence, this court will, however, carefully scrutinize the judicial process by which punishment was imposed." United States v. Cimino, 659 F.2d 535, 537 (5th Cir. 1982); see also, United States v. Clements, 634 F.2d 183, 186 (5th Cir. 1981); United States v. Cauazos, 530 F.2d 4, 5 (5th Cir. 1976); Smith v. Wainwright, 664 F.2d 1194, 1196 (11th Cir. 1976); United States v. Fay, 267 F.2d 507, 510 (2nd Cir. 1959). As long as the trial court stays within statutory bounds

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Rev. 8/82)

and respects procedural safeguards, the sentence may be reversed only for arbitrary or capricious abuse of discretion. United States v. Wheeler, 802 F.2d 778, 783 (5th Cir. 1986); United States v. Garcia, 693 F.2d 412, 415 (5th Cir. 1982).

The three-year sentence which Garlotte received was the maximum jail sentence for his crime, but he was not *fined* as the law allowed. Thus, the lower court did not impose the maximum sentence. The record of the guilty plea clearly shows that the trial court was not acting in an arbitrary or capricious manner; in fact, the court was merely honoring the plea bargain agreement entered into by the district attorney and Garlotte. Extenuating circumstances obviously existed when Garlotte's attorney attempted to plea bargain as to his sentence--he was also plea bargaining and being sentenced on two murder charges contemporaneously with this marijuana possession charge.

Since the sentence was within the bounds of Mississippi law and the trial judge was not acting in an arbitrary or capricious manner in imposing the maximum jail sentence, Garlotte is not entitled to any habeas relief based on his sentence.

As his last ground for relief, Garlotte alleges that he was denied full and fair consideration of his *pro se* pleadings by the Mississippi courts. It is clear that to maintain a petition for habeas corpus, the petitioner must be deprived of some right secured to him by the Constitution or the laws of the United States. Irving v. Thigpen, 732 F.2d 1215, 1216 (5th Cir. 1983) (citing 28 U.S.C. §2254(a) (1982); Baker v. McCollan, 443 U.S. 137

AO 72A
(Rev. 8/82)

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(1979); Trussell v. Estelle, 699 F.2d 256, 259 (5th Cir. 1983)). We are of the opinion that this ground does not present a constitutional issue and, thus, is frivolous for the purposes of habeas relief.

Due to all of the above reasons, it is our opinion that Garlotte is not entitled to relief from this court. We recommend that his petition for writ of habeas corpus be denied.

Parties are hereby notified that failure to file written objections to the findings and recommendations contained in this report within ten days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

This the 13th day of February, 1992.

s/ Alfred G. Nicols, Jr.
UNITED STATES MAGISTRATE JUDGE

AO 72A
(Rev. 8/82)

SOUTHERN DISTRICT OF M.
FILED
JUN 04 199
J. T. NOBLIN, CLERK
BY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

HARVEY F. GARLOTTE

PETITIONER

VERSUS

CIVIL ACTION NO. H89-0187(P)(N)

RAY MABUS, ET AL

RESPONDENTS

ORDER

This cause came on this date to be heard upon the Report and Recommendation of the United States Magistrate Judge, after referral of hearing by this Court, and the Court, having fully reviewed the Report and Recommendation of the United States Magistrate Judge entered in this cause on or about February 13, 1992, the objections filed by Petitioner, the Response filed by Respondents, and being otherwise fully advised in the premises, finds that said Report and Recommendation should be adopted as the opinion of this Court.

IT IS, THEREFORE, ORDERED that the Report and Recommendation of United States Magistrate Judge Alfred G. Nicols, Jr. entered on or about February 13, 1992, be, and the same is hereby adopted as the finding of this Court, and the petition for writ of habeas corpus is hereby dismissed.

A separate judgment will be entered herein in accordance with this Order as required by Rule 58, Fed.R.Civ.P.

SO ORDERED AND ADJUDGED this the 3rd day of ~~MAY~~ June, 1992.

CHARLES W. PICKERING, SR.
UNITED STATES DISTRICT JUDGE

SOUTHERN DISTRICT OF MISSISSI
FILED
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J. T. NOBLIN, CLERK
BY _____ DEPU

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

HARVEY F. GARLOTTE — PETITIONER

VERSUS — CIVIL ACTION NO. H89-0187(P)(N)

RAY MABUS, ET AL — RESPONDENTS

JUDGMENT

This matter having come on to be heard on this date upon the Report and Recommendation of the United States Magistrate Judge entered in this cause on or about February 13, 1992, and the Court, after a full review of the record, having adopted said Report and Recommendation as the finding of the Court by Order dated ~~May~~ June 3rd, 1992, finds that this matter should be dismissed.

IT IS THEREFORE, ORDERED AND ADJUDGED that this cause be, and the same is hereby dismissed with prejudice.

SO ORDERED AND ADJUDGED this the 3rd day of ~~MAY~~ June, 1992.

CHARLES W. PICKERING, SR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

HARVEY F. GARLOTTE, PETITIONER

VERSUS CIVIL ACTION NO. H89-0187(P)

RAY MABUS, GOVERNOR, et al, RESPONDENT

BRIEF ON REMAND

COMES NOW the respondent in the above styled and numbered cause and files this brief on the question of whether or not petitioner has exhausted his state court remedies.

After further review of the prior filings of petitioner before the Mississippi Supreme Court respondent has discovered that petitioner did if fact raise the grounds found in Ground IV (Petitioner was subjected to double jeopardy) and Ground V (Petitioner's sentence was unusual and disproportionate). The reason for the failure of the state to discover these two grounds is that they were not included in the application to the Mississippi Supreme Court, but in the proposed filing before the circuit court. This proposed filing was attached as the ninth exhibit and appeared, without careful reading, to be part of the prior pleadings filed in another case.

Present counsel apologizes for this oversight and would not submit that petitioner seems to have exhausted his state court remedies.

Rec'd 8-4-91

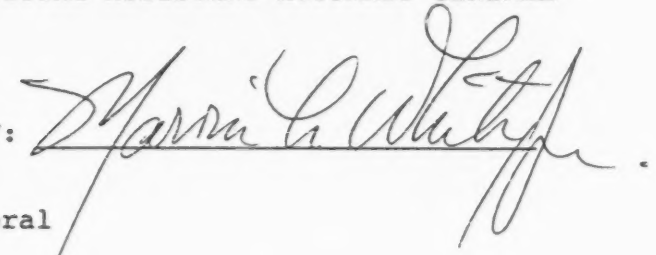
Wherefore, PREMISES CONSIDERED, respondents respectfully move this Court allow it twenty days from the entry of an appropriate order to file its answer to this petition for writ of habeas corpus.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

CHARLENE R. PIERCE
SPECIAL ASSISTANT ATTORNEY GENERAL

BY: 

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3813

CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mail, first-class postage prepaid, a true and correct copy of the foregoing **ANSWER AND RETURN TO PETITION FOR WRIT OF HABEAS CORPUS** to the following:

Harvey F. Garlotte, Pro Se
MSP# 60710, Unit 30-D
Parchman, Mississippi 38738

This the 29th day of July, 1991.

MARVIN L. WHITE, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

HARVEY F. GARLOTTE — PETITIONER

VERSUS — CIVIL ACTION NO. H89-0187(P)

RAY MABUS, ET AL. — RESPONDENTS

RESPONDENT'S CLARIFICATION
OF EXHAUSTION ISSUE IN REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

COMES NOW respondent and files this clarification of its position on the exhaustion issue included in the above styled and numbered cause.

In his Report and Recommendation in this case the Magistrate Judge made the following statement:

> Although it is unclear whether or not Garlotte has exhausted his state court remedies on all of his alleged grounds for relief, it appears that a return to the state court may prove futile. Thus, it is our recommendation that the exhaustion requirement be waived and that Garlotte's petition be considered on the merits. [Emphasis added.]

R. & R. at 2.

This confusion arises from our Brief on Remand filed on July 29, 1991, after this case was remanded to the Magistrate Judge by the District Court for reconsideration. In earlier responses we claimed that Grounds IV and V were not exhausted. On review of the filings by new counsel we discovered that these claims had in fact been exhausted by petitioner. We stated in that document:

> Present counsel apologizes for this oversight and would not submit that

petitioner seems to have exhausted his state court remedies. [Emphasis added.]

Brief on Remand at 1.

The word not was a typographical error and the phrase should read "and would now submit that petitioner seems to have exhausted his state court remedies." This was intended as a submission that the state was waiving the exhaustion issue.

As is clear from the rulings of the United States Supreme Court in Castille v. Peoples, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 379 (1989) and Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) the issue of exhaustion is waivable by the state. However, if the State refuses to waive the issue then the habeas petition must be dismissed as a mixed petition and the petitioner allowed to repair to the state courts to exhaust the unexhausted claims. This is a decision that is the State's to make and not one for the federal courts unless it appears that such would be futile. Of course, a claim can be considered exhausted because it is clearly barred from consideration under state law. It would be futile to return to state court because the state courts would refuse to consider it because it is procedurally barred. This claim is then considered exhausted and the claim must be treated as a claim barred from consideration by the federal courts. Castille v. Peoples, 103 L.Ed.2d at 387.

So that there is no confusion in this case that may come back to haunt the resolution of this petition, the State would

submit that petitioner has exhausted the claims that he now raises.

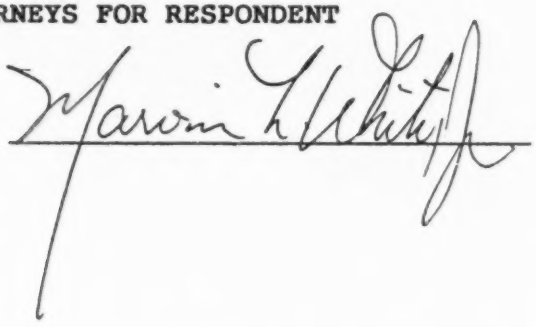
We file this brief not as an objection to the Report and Recommendation of the Magistrate Judge, but to clarify the State's position on the issue of exhaustion of petitioner's state court remedies.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

ATTORNEYS FOR RESPONDENT

BY: 

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing **RESPONDENT'S CLARIFICATION OF EXHAUSTION ISSUE IN REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** to the following:

Harvey F. Garlotte, Pro Se
MSP # 60710, Unit 30-D
Mississippi State Penitentiary
Parchman, Mississippi 38738

This the 19th day of February, 1992.

MARVIN L. WHITE, JR.

U.S. COURT OF APP
FILED
MAR 3 1994
CHARLES R. FULBRUGE
CLEI

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7396

HARVEY F. GARLOTTE,

Petitioner-Appellant,

versus

KIRK FORDICE, Governor,

Defendant-Appellee.

- - - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. CA-H89-0187(P)(N)

- - - - - - - - - - -

O R D E R:

Harvey F. Garlotte moves this Court for a certificate of probable cause (CPC). Garlotte argues that the district court prematurely dismissed his petition without requiring the respondent to file an answer and without conducting an evidentiary hearing.

Rule 4 of the Rules Governing Section 2254 Cases permits the district court to dismiss the petition without requiring the state to respond only if the claims are frivolous, or it appears from the face of the petition that the petitioner is not entitled to relief. McNeil v. Blackburn, 802 F.2d 830, 833 (5th Cir. 1986). In his petition Garlotte alleged, inter alia, that his guilty plea was involuntary and that he was denied effective assistance of counsel. If Garlotte is able to prove these allegations he may be entitled to habeas relief. See McNeil, 802 F.2d at 832-33 (when a defendant pleads guilty on the basis of a

promise by defense counsel or the prosecutor, breach of the promise, even if the promise is unfulfillable, taints the voluntariness of the plea). The district court did not advert to these specific allegations.

Therefore, IT IS ORDERED that Garlotte's motion for CPC is GRANTED. IT IS FURTHER ORDERED that the respondent brief the issue whether the district court prematurely dismissed the petition without requiring an answer and without conducting an evidentiary hearing. See McNeil, 802 F.2d at 933; Tijerina v. Estelle, 692 F.2d 3, 5-6 (5th Cir. 1992) (an evidentiary hearing is required only if factual disputes cannot be resolved on the record).

John M. Duhé Jr.

JOHN M. DUHÉ, JR.
UNITED STATES CIRCUIT JUDGE

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives—Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or

obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendments:

1966. Act Nov. 2, 1966, P. L. 89-711, § 3, 80 Stat. 1106, amended the analysis of this chapter by substituting "Federal" for "State" in item 2254.

1978. Act Nov. 6, 1978, P. L. 95-598, Title II, § 250(b), 92 Stat. 2672 (effective April 1, 1984, as provided by § 402(b) of such Act) amended the analysis of this chapter by adding "2256. Habeas corpus from bankruptcy courts"; however, such amendment did not become effective pursuant to the amendment of such § 402(b) by § 113 of Act July 10, 1984, P. L. 98-353, Title I, 98 Stat. 343.

RESEARCH GUIDE

Federal Procedure L Ed:

2 Fed Proc L Ed, Administrative Procedure § 2:239.

12 Fed Proc L Ed, Evidence § 33:11.

16 Fed Proc L Ed, Habeas Corpus § 41:548.

18A Fed Proc L Ed, Immigration, Naturalization and Nationality § 45:1489.

33 Fed Proc L Ed, Trial § 77:23.

Am Jur:

3A Am Jur 2d, Aliens and Citizens § 2052.

32B Am Jur 2d, Federal Practice and Procedure § 253.

32B Am Jur 2d, Federal Rules of Evidence § 10.

39 Am Jur 2d, Habeas Corpus § 155.

Forms:

2 Fed Procedural Forms L Ed, Appeal, Certiorari, and Review § 3:411.

3 Fed Procedural Forms L Ed, Armed Forces, Civil Disturbances, and National Defense § 5:531.

6A Fed Procedural Forms L Ed, Contempt § 16:91.

10A Fed Procedural Forms L Ed, Immigration, Naturalization, and Nationality § 40:251.

Bankruptcy Service L Ed:

2 Bkr L Ed, Code Commentary and Analysis § 11:117.

Immigration Law Service:

2 Immigration Law Service, Basic Rules § 14:27.

2A Immigration Law Service, Actions by and Against Aliens § 27:32.

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(June 25, 1948, ch 646, § 1, 62 Stat. 964; May 24, 1949, ch 139, § 112, 63 Stat. 105; Sept. 19, 1966, P. L. 89-590, 80 Stat. 811.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is based on R. S. §§ 751, 752, 753; Act March 3, 1911, ch 231, § 291, 36 Stat. 1167; Feb. 13, 1925, ch 229, § 6, 43 Stat. 940; June 29, 1938, ch 806, 52 Stat. 1232 (§§ 451, 452, and 453 of former Title 28).

Section consolidates sections cited with changes in phraseology necessary to effect the consolidation. Words "for the purpose of an inquiry into the cause of restraint of liberty" in former 28 USCS § 452 were omitted as merely descriptive of the writ. Subsection (b) was added to give statutory sanction to orderly and appropriate procedure. A circuit judge who unnecessarily entertains applications which should be addressed to the district court, thereby disqualifies himself to hear such matters on appeal and to that extent limits his usefulness as a judge of the court of appeals. The Supreme Court and Supreme Court Justices shall not be burdened with applications for writs cognizable in the district courts.

could not review decision of board that registrant was not entitled to exemption as a minister of religion, where record did not disclose such facts as were within knowledge of board. Harris v Ross (1944, CA5 Ga) 146 F2d 355.

Although at hearing upon writ of habeas corpus it appeared that since commencement war theological seminary had had suspicious increase in its membership, that fact was not before draft board in particular case, and Court of Appeals could not consider it in deciding whether there was substantial evidence to support the denial of claimed theological student exemption. United States ex rel. Levy v Cain (1945, CA2 NY) 149 F2d 338.

IV. DISPOSITION OF APPEAL

35. Generally

In light of petitioner's history of filing numerous, legally frivolous petitions, he would be barred from filing any new petition seeking extraordinary writs. Demos v United States Dist. Court (1991, CA9) 925 F2d 1160, 91 CDOS 1067, 91 Daily Journal DAR 1645, cert den (1991, US) 112 L Ed 2d 1186, 111 S Ct 1082, later proceeding (1992, CA9 Wash) 1992 US App LEXIS 10303.

36. Removal of appeal from docket

Where petitioner voluntarily absented himself from country, appeal removed from docket without prejudice to right to have appeal reinstated on appropriate motion if within prescribed time (30 days), petitioner became available and subject to judgment of court. United States ex rel. Bottoms v Eberhardt (1972, CA5 Ga) 467 F2d 578.

Where petitioner became a fugitive, appeal removed from docket without prejudice to reinstatement upon appropriate motion if petitioner became available to court and subject to judgment within prescribed time (30 days); if time elapses without necessary appearance, appeal will be dismissed. Van Blaricom v Forscht (1974, CA5 Fla) 490 F2d 461, on reh (1975, CA5 Fla) 511 F2d 615, cert den (1975) 423 US 915, 46 L Ed 2d 144, 96 S Ct 222.

37. Withdrawal of appeal

Mental patient who was conditionally released from custody may withdraw his appeal from denial of writ of habeas corpus, although court will not stay proceedings and retain jurisdiction notwithstanding contention that hospital retained power to return petitioner to maximum security without even minimal due process hearing. Jackson v Robinson (1973) 155 App DC 94, 476 F2d 539.

38. Remand of proceedings

Where in habeas corpus proceeding it was not established whether or not inductee who had claimed classification as conscientious objector objected to participation in any war under any circumstances because of compelling voice of his conscience, Court of Appeals in reviewing order of district court dismissing petition and writ would not order inductee discharged but would remand him to district court for ascertainment as to whether or not director of selective service had adopted the finding of hearing officer to effect that inductee did not have conscientious objections to war under any circumstances. United States ex rel. Reel v Badt (1944, CA2 NY) 141 F2d 845.

Absent a ruling by district judge on application for certificate of probable cause, case remanded to secure same in interest of petitioner's right to a first level decision. Stewart v Beto (1971, CA5 Tex) 454 F2d 268.

Where petitioners pro se habeas corpus petition, though rather incoherent, indicated he might be entitled to relief, justice requires cause be remanded to District Court with instructions to permit petitioner leave to amend petition with aid of appointed counsel. Fryer v MacDougall (1972, CA5 Ga) 462 F2d 1093.

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has

the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support

such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(June 25, 1948, ch 646, § 1, 62 Stat. 967; Nov. 2, 1966, P. L. 89-711, § 2, 80 Stat. 1105.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is declaratory of existing law as affirmed by the Supreme Court. (See Ex parte Hawk (1944) 321 US 114, 88 L Ed 572, 64 S Ct 448.) This section was enacted as amended by the Senate with the following explanation:

"This amendment is proposed by the Judicial Conference of Senior Circuit Judges.

"It has three purposes. The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore be spelled out in more detail in the section as is done by the amendment."

Amendments:

1966. Act Nov. 2, 1966, in the section heading, substituted "Federal" for "State"; added subsec. (a); designated existing matter as subsecs. (b) and (c); and added subsecs. (d)–(f).

...ange, 1986, ch. 413, § 64, eff from and after passage (approved March 28, 1986).

Editor's Note—

This section was reenacted without change by Laws, 1986, ch. 413, § 64, effective from and after passage (approved March 28, 1986). Since the text of the section as it appears in the parent volume is unaffected by the reenactment, it is not reprinted in the supplement as directed by § 144 of ch. 413, Laws, 1986.

Section 118 of Chapter 465, Laws of 1981, which provided for an automatic repeal of provisions reenacting the Department of Corrections and the State Parole Board on June 30, 1984, was repealed by Section 126, Chapter 471, Laws of 1984. In turn, Section 128, Chapter 471, Laws of 1984, provides for an automatic repeal of this section from and after July 1, 1986. Subsequently, Laws of 1986, ch. 413, § 126, effective from and after passage (approved March 28, 1986) repealed § 128 of ch. 471, Laws of 1984, thereby removing the repeal date.

JUDICIAL DECISIONS

A judge's use of county prisoners to carry out personal labors on his own behalf justified removal of the judge from office. In Re Collins (1987, Miss) 524 So 2d 553.

§ 47-5-138. Earned time allowances; promulgations of rules and regulations; forfeiture generally; release of offender.

(1) The State Board of Corrections shall formulate and promulgate rules and regulations providing for earned time allowances to be awarded to offenders based upon the performance of the offenders and for meritorious earned time allowances to be awarded pursuant to the provisions of Section 47-5-142. Except that earned time allowances and/or meritorious earned time allowances shall not be awarded to offenders sentenced to life imprisonment. Such rules and regulations shall not provide for earned time allowances and/or meritorious earned time allowances exceeding one-half (½) of the period of confinement imposed by the court. Such rules and regulations shall differentiate between habitual offenders for the purposes of awarding earned time or meritorious earned time. "Habitual offender" shall be defined as a person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times

(CONTINUED ON NEXT PAGE)

and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere.

(2) The wardens of the various correctional facilities within the state shall immediately notify the State Department of Corrections in writing of any punishment imposed or other disciplinary action taken against any offender under such warden's custody, said report to be on forms prescribed and furnished by the State Department of Corrections, and shall show, among other things, the detail assignment and behavior record of the offender. From said record so furnished, the Commissioner of Corrections or his designee may suspend the offender from receiving earned time or meritorious earned time for a specified period, and may forfeit up to one-half (½) the earned time allowances or meritorious earned time allowances where the disciplinary action involves a serious violation of prison rules and regulations or forfeit all or any part of earned time allowances or meritorious earned time allowances where the violation is a crime punishable by law and the forfeiture is in lieu of prosecution.

(3) An offender shall be released at the expiration of his term of sentence, less the time earned as earned time allowances and meritorious earned time allowances.

SOURCES: Reenacted and amended, Laws, 1984, ch. 386; reenacted, 1984, ch. 471, § 65; 1985, ch. 531, § 2; reenacted, 1986, ch. 413, § 65, eff from and after passage (approved March 28, 1986).

Editor's Note—

Section 118 of Chapter 465, Laws of 1981, which provided for an automatic repeal of provisions reenacting the Department of Corrections and the State Parole Board on June 30, 1984, was repealed by Section 126, Chapter 471, Laws of 1984. In turn, Section 128, Chapter 471, Laws of 1984, provides for an automatic repeal of this section from and after July 1, 1986. Subsequently, Laws of 1986, ch. 413, § 126, effective from and after passage (approved March 28, 1986) repealed § 128 of ch. 471, Laws of 1984, thereby removing the repeal date.

Cross references—

Meritorious earned time, see § 47-5-142.

Eligibility for earned time credit for inmates participating in joint state-county public service work programs, see § 47-5-413.

Provision for notice to the sheriff of the county in which an offender was convicted prior to release of the offender from the custody of the Department of Corrections, see § 47-5-177.

Earned time credit for inmates participating in joint state-county work program, see § 47-5-461.

Participation in a drug identification program by a person on probation or parole, see §§ 47-5-501 et seq.

Provisions relative to prison system overcrowding and the exercise of powers which tend to reduce prison system population or expand operating capacity during states of emergency, see §§ 47-5-701 et seq.

Utilization of powers which tend to reduce prison system population, including earned time allowances, prior to declaration of a prison system overcrowding state of emergency, see § 47-5-705.

Procedures for revocation of conditional advancement of parole eligibility date during period of prison overcrowding, see § 47-5-723.

Relationship between earned time allowances and advancement of parole eligibility dates during periods of prison overcrowding, see § 47-5-727.

JUDICIAL DECISIONS

Defendant sentenced as habitual offender has no entitlement to credit for "good time." Hardy v State (1985, Miss) 473 So 2d 941.

The actions of corrections officials in designating a prisoner eligible for earned time, due to an administrative or clerical error, and then in withdrawing that designation, did not amount to a forfeiture of earned time without

from his parole eligibility date since he did not become eligible for earned time until after the Attorney General issued an opinion discontinuing the practice of allowing earned time to shorten parole eligibility. McFadden v State (1988, Miss) 523 So 2d 77.

certain privileges available to other prisoners. Perkins v Cabana (1986, CA5 Miss) 794 F2d 168, cert den (US) 93 L Ed 2d 366, 107 S Ct 414.

§ 47-5-139. Earned time for good conduct and performance; forfeiture of earned time in event of escape.

(1) In order to encourage discipline, a distinction shall be made in the treatment of offenders so as to extend to all such as are orderly, industrious and obedient the comforts and privileges according to their deserts. The reward to be bestowed on prisoners for good conduct and performance shall consist of such relaxation of strict prison rules and extension of social privileges as may be consistent with proper discipline and security.

(2) The classification committee shall group all inmates into one (1) of four (4) separate and distinct classes with earned time to be earned as follows:

(a) Offenders in Class I shall be allowed to earn up to thirty (30) days reduction for each month served.

(b) Offenders in Class II shall be allowed to earn up to twenty (20) days reduction for each month served.

(c) Offenders in Class III shall be allowed to earn up to eight (8) days reduction for each month served.

(d) Offenders in Class IV shall not be allowed to earn any earned time.

Provided further, an inmate shall be placed in Class IV when received at the correctional system and shall remain in such class for at least thirty (30) calendar days. Any subsequent promotion, whether original or after having been demoted, shall be made only to the next highest class in which the inmate must remain for a reasonable time to evaluate performance before being again promoted.

Offenders may be reclassified as often as the committee deems necessary to carry out the purposes of this section and to maintain good discipline and efficiency at the institution.

Provided, however, any change in classification of an offender shall be subject to the approval of the commissioner.

(3) An offender under two (2) or more consecutive sentences shall be allowed commutation based upon the total term of the sentences. Provided, that under consecutive life sentences, the commutation shall be based on the aggregate total arrived at by multiplying the number of such sentences by ten (10) years.

(4) No inmate shall earn any earned time while assigned to the maximum security facilities for disciplinary purposes.

(5) All earned time shall be forfeited by the inmate in the event of escape and/or aiding and abetting an escape. Provided, in the event of escape, the commissioner may restore all or part of any accrued earned time if the escapee returns to the institution voluntarily, without expense to the state, and without act of violence while a fugitive from the facility.

(6) Only Class I offenders shall be eligible for parole.

(7) No inmate in any event shall have his sentence terminated by administrative earned time action until he is eligible for parole as provided in Title 47, Chapter 7, Mississippi Code of 1972.

(8) Any officer or employee who shall willfully violate the provisions of this section and be convicted therefor shall be removed from office or employment.

SOURCES: Laws, 1982, ch. 431, § 2; reenacted, 1984, ch. 471, § 66; reenacted, 1986, ch. 413, § 66, eff from and after passage (approved March 28, 1986).

Editor's Note—

Section 118 of Chapter 465, Laws of 1981, which provided for an automatic repeal of provisions reenacting the Department of Corrections and the State Parole Board on June 30, 1984, was repealed by Section 126, Chapter 471, Laws of 1984. In turn, Section 128, Chapter 471, Laws of 1984, provides for an automatic repeal of this section from and after July 1, 1986. Subsequently, Laws of 1986, ch. 413, § 126, effective from and after passage (approved March 28, 1986) repealed § 128 of ch. 471, Laws of 1984, thereby removing the repeal date.

Cross references—

Penalty of life imprisonment without parole for sale of specified quantities of certain drugs, see § 41-29-139.

Meritorious earned time, see § 47-5-142.

Eligibility for earned time credit for inmates participating in joint state-county public service work programs, see § 47-5-413.

Earned time credit for inmates participating in joint state-county work program, see § 47-5-461.

Utilization of powers which tend to reduce prison system population, including earned time allowances, prior to declaration of a prison system overcrowding state of emergency, see § 47-5-705.

Procedures for revocation of conditional advancement of parole eligibility date during period of prison overcrowding, see § 47-5-723.

Relationship between earned time allowances and advancement of parole eligibility dates during periods of prison overcrowding, see § 47-5-727.

JUDICIAL DECISIONS

Under the requirement of § 47-7-3 that a person under a life sentence becomes eligible for parole after ten years, a prisoner serving three consecutive life terms would not be eligible for parole until he had served at least ten years of each life sentence less 30 percent of earned good time, since § 47-5-139(3) mandates the mathematical process of multiplying the number of life sentences imposed upon the prisoner by ten years to determine the date upon which the prisoner would become eligible for parole. Davis v State (1983, Miss) 429 So 2d 262.

A defendant convicted of armed robbery was not eligible to reduce his sentence with the grant of administrative good time, pursuant to § 47-5-139, since earned time for good conduct and performance only applies to inmates who are eligible for parole, and defendant was not entitled to parole under § 47-7-

ment of Corrections administratively barring him from earning good time after January, 1981, although good time earned prior to that date was not taken away, notwithstanding the provisions of § 47-5-139(7), since the statutory provisions regarding good time remained unchanged, and since administrative interpretation of a clearly worded statute is not a "law" within the scope and contemplation of the ex post facto clauses of the federal and state Constitutions. Tiller v State (1983, Miss) 440 So 2d 1001.

Denial of credit for time served in jail and of "good time" to person convicted of felony who appeals judgment of conviction and who remains in jail pending disposition of appeal due to inability to make bond, while allowing credit for time served in jail and award of "good time" to convicted felons serving sen-

tence in county jail without appealing convic-

SOURCES: Reenacted without change, Laws, 1984, ch. 471, § 67; reenacted without change, 1986, ch. 413, § 67, eff from and after passage (approved march 28, 1986).

Editor's Note—

This section was reenacted without change by Laws, 1986, ch. 413, § 67, effective from and after passage (approved March 28, 1986). Since the text of the section as it appears in the parent volume is unaffected by the reenactment, it is not reprinted in the supplement as directed by § 144 of ch. 413, Laws, 1986.

Section 118 of Chapter 465, Laws of 1981, which provided for an automatic repeal of provisions reenacting the Department of Corrections and the State Parole Board on June 30, 1984, was repealed by Section 126, Chapter 471, Laws of 1984. In turn, Section 128, Chapter 471, Laws of 1984, provides for an automatic repeal of this section from and after July 1, 1986. Subsequently, Laws of 1986, ch. 413, § 126, effective from and after passage (approved March 28, 1986) repealed § 128 of ch. 471, Laws of 1984, thereby removing the repeal date.

§ 47-5-141. [En Laws, 1982, ch. 431, § 3] Repealed by Laws, 1983, ch. 391, § 2, eff from and after March 24, 1983.

Editor's note—

This section provided for voluntary donations of blood.

§ 47-5-142. Meritorious earned time.

(1) In order to provide incentive for offenders to achieve positive and worthwhile accomplishments for their personal benefit or the benefit of others, and in addition to any other administrative reductions of the length of an offender's sentence, any offender shall be eligible, subject to the provisions of this section, to accrue meritorious earned time as distinguished from earned time for good conduct and performance.

(2) Subject to approval by the commissioner of the terms and conditions of the program or project, meritorious earned time may be awarded for the following: (a) successful completion of educational or instructional programs; (b) satisfactory participation in work projects; and (c) satisfactory participation in any special incentive program.

(3) The programs and activities through which meritorious earned time may be accrued shall be published in writing and posted in conspicuous places at all facilities of the department and such publication shall be made available to all offenders in the custody of the department.

(4) The commissioner shall make a determination of the number of days reduction of sentence which may be earned as meritorious earned time for participation in approved programs or projects, and such number shall be determined by the commissioner on the basis of each particular program or project. However, in no event shall an offender be allowed to earn in excess of ten (10) days reduction for each thirty (30) days of participation in such a

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program or project. Furthermore, an offender shall never be allowed to earn more than a total of one hundred eighty (180) days of meritorious earned time during the entire time he is under the jurisdiction of the Department of Corrections.

(5) No offender shall earn any meritorious earned time while assigned to the maximum security facilities for disciplinary purposes.

(6) All meritorious earned time shall be forfeited by the offender in the event of escape and/or aiding and abetting an escape. Provided, in the event of escape, the commissioner may restore all or part of any accrued meritorious earned time if the escapee returns to the institution voluntarily, without expense to the state, and without act of violence while a fugitive from the facility.

(7) Any officer or employee of the department who shall willfully violate the provisions of this section and be convicted therefor shall be removed from office or employment.

SOURCES: Laws, 1985, ch. 531, § 1, eff from and after July 1, 1985.

Cross references—

Earned time, generally, see §§ 47-5-138, 47-5-139.

Earned time credit for inmates participating in joint state-county public service work programs, see §§ 47-5-413.

Prison Overcrowding Emergency Powers Act, see §§ 47-5-701 et seq.

Effect of meritorious earned time upon parole eligibility, see § 47-7-3.

Penalties for state and county prisoners who escape from custody, see §§ 97-9-43 et seq.

Research and Practice References—

60 Am Jur 2d, Penal and Correctional Institutions §§ 58-64.

72 CJS, Prisons § 21.

22 Am Jur Trials, Prisoners' Rights Litigation §§ 1 et seq.

ALR and L Ed Annotations—

Withdrawal, forfeiture, modification, or denial of good-time allowance to prisoner. 95 ALR2d 1265.

Denial of state prisoner's application for, or revocation of, participation in work or study release program or furlough program as actionable under Civil Rights Act of 1871 (42 USCS

CHAPTER NO. 520
SENATE BILL NUMBER 2030

AN ACT TO AMEND SECTION 47-5-138, MISSISSIPPI CODE OF 1972, TO REVISE EARNED TIME ALLOWANCE FOR INMATES; TO AUTHORIZE THE DEPARTMENT OF CORRECTIONS TO PREPARE A CONDITIONAL EARNED TIME RELEASE DATE FOR ALL INMATES; TO PROVIDE FOR THE FORFEITURE OF EARNED TIME ALLOWANCES IF VIOLATION IS FELONIOUS IN NATURE; TO DELETE PROVISIONS PERTAINING TO HABITUAL OFFENDERS AND OFFENDERS SENTENCED TO LIFE IMPRISONMENT; TO AMEND SECTION 47-5-139, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT INMATES SENTENCED AS HABITUAL OFFENDERS, SENTENCED TO LIFE IMPRISONMENT, SENTENCED FOR ARMED ROBBERY AND SEX OFFENDERS DENIED PAROLE SHALL NOT BE ELIGIBLE FOR EARNED TIME ALLOWANCE; TO AMEND SECTION 47-5-140, MISSISSIPPI CODE OF 1972 TO CONFORM; TO AMEND SECTION 47-5-142, MISSISSIPPI CODE OF 1972, TO REVISE MERITORIOUS EARNED-TIME ALLOWANCES; AND FOR RELATED PURPOSES.

Be it enacted by the Legislature of the State of Mississippi:

SECTION 1. Section 47-5-138, Mississippi Code of 1972, is amended as follows:

47-5-138. (1) The department may promulgate rules and regulations to carry out the earned time allowances program. An inmate shall be eligible to receive an earned time allowance of one-half (1/2) of the period of confinement imposed by the court except those inmates excluded by law. The department shall determine a conditional earned time release date by subtracting the earned time allowance from an inmate's term of sentence and shall prepare a conditional earned time release date for each inmate.

(2) If an inmate commits a violation felonious in nature, he may forfeit all or part of the earned time allowance upon the written order of the commissioner. The superintendent of a correctional facility shall immediately notify the commissioner in writing of any such violation on such forms and in such detail as the commissioner may require. From the record so furnished, the Commissioner of Corrections may order the forfeiture of all or part of the earned time allowance of an inmate who commits a violation felonious in nature. The order of the commissioner shall be in writing and the conditional earned time release date shall be modified accordingly.

(3) An offender, demonstrating acceptable behavior, shall be released on his conditional earned time release date.

SECTION 2. Section 47-5-139, Mississippi Code of 1972, is amended as follows:

47-5-139. (1) An inmate shall not be eligible for the earned time allowance if:

(a) The inmate was sentenced to life imprisonment;

(b) The inmate was convicted as a habitual offender under Sections 99-19-81 through 99-19-87;

(c) The inmate has forfeited his earned time allowance by order of the commissioner;

(d) The inmate was convicted of a sex crime and has been denied parole based on the psychiatric or psychological examination required by law; or

(e) The inmate has not served the mandatory time required for parole eligibility for a conviction of robbery or attempted robbery with a deadly weapon.

Defendant sentenced a habitual offender has no entitlement to credit for "good time." Hardy v State (1985, Miss) 473 So 2d 941.

Reasonable and harmonious construction of §§ 47-5-138, 47-5-139, and 47-7-3 is that legislature intended them to maintain enhanced penalty that § 99-19-81 imposes on habitual offenders, which penalty includes denial of certain privileges available to other prisoners. Perkins v Cabana (1986, CA5 Miss) 794 F2d 168, cert den 479 US 936, 93 L Ed 2d 366, 107 S Ct 414.

§ 47–5–139. Certain inmates ineligible for earned time allowance; commutation to be based on total term of sentences; forfeiture of earned time in event of escape.

(1) An inmate shall not be eligible for the earned time allowance if:

(a) The inmate was sentenced to life imprisonment;

(b) The inmate was convicted as a habitual offender under Sections 99-19-81 through 99-19-87;

(c) The inmate has forfeited his earned time allowance by order of the commissioner;

(d) The inmate was convicted of a sex crime and has been denied parole based on the psychiatric or psychological examination required by law; or

(e) The inmate has not served the mandatory time required for parole eligibility for a conviction of robbery or attempted robbery with a deadly weapon.

(2) An offender under two (2) or more consecutive sentences shall be allowed commutation based upon the total term of the sentences.

(3) All earned time shall be forfeited by the inmate in the event of escape and/or aiding and abetting an escape. Provided, in the event of escape, the commissioner may restore all or part of the earned time if the escapee returns to the institution voluntarily, without expense to the state, and without act of violence while a fugitive from the facility.

(4) No inmate in any event shall have his sentence terminated by administrative earned time action until he is eligible for parole as provided in Title 47, Chapter 7, Mississippi Code of 1972.

(5) Any officer or employee who shall willfully violate the provisions of this section and be convicted therefor shall be removed from office or employment.

SOURCES: Codes, 1942, § 7944; Laws, 1964, ch. 378, § 24; 1971, ch. 524, § 12; 1973, ch. 357, § 1; 1974, ch. 539, § 29; 1975, ch. 485, §§ 2, 5; 1976, ch. 389; 1976, ch. 440, § 67; 1977, ch. 479, § 3; reenacted, 1981, ch. 465, § 74; 1981, ch. 502, § 10; 1982, ch. 431, § 2; reenacted, 1984, ch. 471, § 66; reenacted, 1986, ch. 413, § 66; 1992, ch. 520, § 2, eff from and after passage (approved May 14, 1992).

Cross references—

Penalty of life imprisonment without parole for sale of specified quantities of certain drugs, see § 41-29-139.

Classification committee, see §§ 47-5-99 et seq.

Proceedings before classification committee on demotion of offenders or forfeiture of earned time, see § 47-5-104.

Handbook explaining earned time procedure, see § 47-5-140.

Meritorious earned time, see § 47-5-142.

Eligibility for earned time credit for inmates participating in joint state-county public service work programs, see § 47-5-413.

Earned time credit for inmates participating in joint state-county work program, see § 47-5-

§ 47-5-142. Meritorious earned time.

(1) In order to provide incentive for offenders to achieve positive and worthwhile accomplishments for their personal benefit or the benefit of others, and in addition to any other administrative reductions of the length of an offender's sentence, any offender shall be eligible, subject to the provisions of this section, to receive meritorious earned time as distinguished from earned time for good conduct and performance.

(2) Subject to approval by the commissioner of the terms and conditions of the program or project, meritorious earned time may be awarded for the following: (a) successful completion of educational or instructional programs; (b) satisfactory participation in work projects; and (c) satisfactory participation in any special incentive program.

(3) The programs and activities through which meritorious earned time may be received shall be published in writing and posted in conspicuous places at all facilities of the department and such publication shall be made available to all offenders in the custody of the department.

(4) The commissioner shall make a determination of the number of days of reduction of sentence which may be awarded an offender as meritorious earned time for participation in approved programs or projects; the number of days shall be determined by the commissioner on the basis of each particular program or project. However, in no event shall an offender be awarded in excess of ten (10) days reduction for each thirty (30) days of participation in such a program or project. Furthermore, an offender shall never be allowed to earn more than a total of one hundred eighty (180) days of meritorious earned time during the entire time he is under the jurisdiction of the Department of Corrections. The commissioner may authorize the awarding of all or any part of meritorious earned time upon an offender's entry into the correctional system.

(5) No offender shall be awarded any meritorious earned time while assigned to the maximum security facilities for disciplinary purposes.

(6) All meritorious earned time shall be forfeited by the offender in the event of escape and/or aiding and abetting an escape.

(7) Any officer or employee of the department who shall willfully violate the provisions of this section and be convicted therefor shall be removed from office or employment.

(8) An offender may forfeit all or any part of his meritorious earned time allowance for just cause upon the written order of the commissioner or his designee. Any meritorious earned time allowance forfeited under this section shall not be restored nor shall it be re-earned by the offender.

SOURCES: Laws, 1985, ch. 531, § 1; 1992, ch. 520, § 4, eff from and after passage (approved May 14, 1992).

and personnel of the department of corrections utilized for adult offenders who are committed to the custody of the department.

(k) "Special meetings" shall mean those meetings called by the chairman with at least twenty-four (24) hours' notice or a unanimous waiver of notice.

SOURCES: Laws, 1976, ch. 440, § 3; reenacted, 1981, ch. 465, § 91; reenacted, 1984, ch. 471, § 101; reenacted, 1986, ch. 413, § 101, eff from and after passage (approved March 25, 1986).

Editor's Note—

Laws, 1976, ch. 465, § 118, provides as follows:

"SECTION 1. This act shall be known and may be cited as the "Mississippi Corrections Act of 1976.".

§ 47-7-3. Parole of prisoners; conditions; determination of tentative hearing date.

(1) Every prisoner who has been or may hereafter be convicted of any offense against the State of Mississippi, and is confined in the execution of a judgment of such conviction in the Mississippi State Penitentiary for a definite term or terms of one (1) year or over, or for the term of his or her natural life, whose record of conduct shows that such prisoner has observed the rules of the Penitentiary, and who has served not less than one-fourth (1/4) of the total of such term or terms for which such prisoner was sentenced, or, if sentenced to serve a term or terms of thirty (30) years or more, or, if sentenced for the term of the natural life of such prisoner, has served not less than ten (10) years of such life sentence, may be released on parole as hereinafter provided, except that:

(a) No prisoner convicted as a confirmed and habitual criminal under the provisions of Sections 99-19-81 through 99-19-87 shall be eligible for parole;

(b) Any person who shall have been convicted of a sex crime, and who is otherwise eligible for parole, shall not be released on parole until after he has been examined by a competent psychiatrist or by a competent psychologist selected by the State Parole Board. Such examination must have occurred not more than one (1) year prior to the prisoner's parole hearing. Upon completion of the examination a written report of the psychiatric or psychological examination shall be forwarded immediately to each member of the Parole Board. The written report of the examining psychiatrist or psychologist shall state whether the sex offender is likely or unlikely to commit another sex crime. The Parole Board may also order psychiatric or psychological examinations for persons convicted of other crimes when it determines such examination is necessary to making a parole decision;

(c) No one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowances, in which case he shall be eligible for parole if he has served (i) nine (9) months of his sentence or sentences, when his sentence or sentences is two (2) years or less; (ii) ten (10) months of his sentence or sentences when his sentence or sentences is more than two (2) years but no more than five (5) years; and (iii) one (1) year of his sentence or sentences when his sentence or sentences is more than five (5) years;

(d) No person shall be eligible for parole who shall, on or after January 1, 1977, be convicted of robbery or attempted robbery through the display of a firearm until he shall have served ten (10) years if sentenced to a term or terms of more than ten (10) years or if sentenced for the term of the natural life of such person. If such person is sentenced to a term or terms of ten (10) years or less, then such person shall not be eligible for parole. The provisions of this paragraph (d) shall also apply to any person who shall commit robbery or attempted robbery on or after July 1, 1982, through the display of a deadly weapon;

(2) Notwithstanding any other provision of law, an inmate shall not be eligible to receive earned time, good time or any other administrative reduction of time which shall reduce the time necessary to be served for parole eligibility as provided in subsection (1) of this section; however, this subsection shall not apply to the advancement of parole eligibility dates pursuant to the Prison Overcrowding Emergency Powers Act. Moreover, meritorious earned time allowances may be used to reduce the time necessary to be served for parole eligibility as provided in paragraph (c) of subsection (1) of this section.

(3) The State Parole Board shall by rules and regulations establish a method of determining a tentative parole hearing date for each offender taken into the custody of the Department of Corrections from and after January 1, 1987. The tentative parole hearing date shall be determined within ninety (90) days after the department has assumed custody of the offender. Such tentative parole hearing date shall be calculated by a formula taking into account the offender's age upon first commitment, number of prior incarcerations, prior probation or parole failures, the severity and the violence of the offense committed, employment history and other criteria which in the opinion of the board tend to validly and reliably predict the length of incarceration necessary before the offender can be successfully paroled.

(4) Any inmate within twenty-four (24) months of his parole eligibility date and who meets the criteria established by the classification committee shall receive priority for placement in any educational development and job training programs. Any inmate refusing to participate in an educational development or job training program may be ineligible for parole.

SOURCES: Codes, 1942, § 4004-03; Laws, 1944, ch. 334, § 2; 1946, ch. 486, § 2; 1950, ch. 524, § 4; 1958, ch. 233, § 2; 1964, ch. 366; 1976, ch. 440, § 79; 1976, ch. 470, § 5; 1980, ch. 511; reenacted 1981, ch. 405, § 92; 1982, ch. 431, § 1; reenacted, 1984, ch. 471, § 102; 1985, ch. 490, § 10; 1985, ch. 531, § 3; reenacted and amended, 1986, ch. 413, § 102; 1986, ch. 435, § 1; 1989, 1st Ex Sess, ch. 3, § 4; 1993, ch. 443, § 1, eff from and after July 1, 1993.

Cross references—

Penalty of life imprisonment without parole for sale of specified quantities of certain drugs, see § 41-29-139.

Availability of parole to persons convicted under the Uniform Controlled Substances Law or prior law superseded thereby, see § 41-29-149.

Advancement of parole eligibility dates during periods of prison overcrowding, see §§ 47-5-701 through 47-5-729.

Prison Overcrowding Emergency Powers Act, see §§ 47-5-701 through 47-5-729.

Good time, see §§ 47-5-138 et seq.

Exclusivity of State Parole Board's responsibility for granting or revoking parole, as provided by this section, see § 47-7-5.

§ 99-19-23. Sentence—credit for time of prisoner's confinement.

The number of days spent by a prisoner in incarceration in any municipal or county jail while awaiting trial on a criminal charge, or awaiting an appeal to a higher court upon conviction, shall be applied on any sentence rendered by a court of law or on any sentence finally set after all avenues of appeal are exhausted.

SOURCES: Codes, 1942, § 2540.5; Laws, 1968, ch. 382, § 1, eff from and after passage (approved April 11, 1968).

Research and Practice References—
24B CJS. Criminal Law §§ 1995(5), 1995(6).

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Mr. Eddie M. Lucas
Commissioner
Mississippi Department of Corrections
723 North President Street
Jackson, Mississippi 39202

Dear Commissioner Lucas:

Attorney General Mike Moore has received your letter dated May 20, 1993 and has assigned it to the undersigned for research and reply. Within the letter you request an official Attorney General's opinion concerning the following as it was stated:

Facts:
Senate Bill 2294 passed in the 1993 regular session and approved by the Governor changed Section 47-7-3(c) of the Mississippi Code of 1972 annotated by adding or sentences to the word "sentence." Their language would seem to change the reasoning used on prior opinions (1986-Gibbs, 1992-Perkins) as to whether to allow time computation for parole on the aggregate total of consecutive sentences rather than on each individual sentence.

My questions are:

1) Should the MDOC begin July 1, 1993 computing time for parole on the aggregate total of consecutive sentences rather than on each individual sentence.
2) Should this apply to all inmates or only to those sentenced after July 1, 1993.

It is correct to consider the prior opinions of this office as guidance in answering the posed questions. The opinion of June 22, 1992 by Roy Perkins, Special Assistant Attorney General, referenced an earlier opinion, dated June 12, 1986 addressed to

the Commissioner in which this office considered the time at which an inmate is eligible for parole. The language of Mississippi Code Ann. Section 47-7-3(1)(c) was contemplated, as that section states:

"No one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowance, in which case he shall be eligible for parole if he has served (i) nine (9) months of his sentence, when his sentence is two (2) years or less; (ii) ten (10) months of his sentence when his sentence is more than two (2) years but no more than five (5) years; and (iii) one (1) year of his sentence, when his sentence is more than five (5) years; ..."

Thus, the opinion explained that

"It is important to note in this section that the word "sentence" is singular (rather than plural as in "terms of sentence" which is found at Section 47-7-3(1). Therefore, it is the opinion of this office that an inmate must serve one year of each consecutive sentence before he is eligible for parole. For example, if an inmate has two consecutive sentences of two years each, he would have to serve one year on each sentence for a total of two years before he would be eligible for parole. (Note: This would not apply in cases where an inmate may receive meritorious earned time or when the Governor uses the Emergency Powers Act)."

Again, on June 22, 1992, this office wrote an opinion concerning commutation of an offender's sentence. It relied upon the above in response to two questions raised about the statutory treatment of consecutive sentences. MCA Section 47-5-139(2) was cited as the authority which provides, "an offender under two (2) or more consecutive sentences shall be allowed commutation based upon the total term of the sentences." (emphasis mine) Note that the word "sentences" is plural in this statute. The opinion was reasonod,

"My response to question 4(a) is that an individual with two (2) consecutive life sentences must serve ten (10) years on each sentence before he is eligible for parole. See: Ezra Prater v. State of Mississippi, 579 So. 2d 569 (Miss. 1991) and Section 47-7-3(1). With reference to question 4(b), an individual serving a life sentence and thirty (30) years consecutive must likewise serve ten (10) years on each sentence before he is eligible for parole."

Ever since 1942, ambiguities in sentencing orders, pertaining to multiple sentences, should be construed in favor of the convict. See eg. Anderson v. State, 288 So.2d 852 (Miss. 1974). An

example of how this rationale is applied to ambiguous statutory language concerning prisoner sentences is found in yet a third Attorney General's opinion, that of August 19, 1985, addressed to the Commissioner of Corrections. It was explained that amendments in 1983 changed MCA Section 99-19-21 by removing the mandatory consecutive sentence provisions and make it totally discretionary with the sentencing judge as to whether multiple sentences would run concurrently or consecutively. Therefore, the following statement was made to apply the aforementioned Anderson case logic to that situation:

"The statutory mandate of consecutive sentences having been removed, it is the opinion of this office that the Supreme Court would now hold that a sentencing order entered on or after March 14, 1983, imposing a second or subsequent sentence, that is silent as to whether said sentence is to be served concurrently or consecutively with the previous sentence or sentences is ambiguous under the Anderson doctrine, requiring that it be construed in favor of the convict as a concurrent sentence."

Such opinion would indicate that where there is uncertainty as to whether an order of the court is concurrent or consecutive with the previous sentence or sentences (Plural), then ambiguity is present, thus requiring application of the Anderson doctrine and construction of the matter in favor of the convict.

When this doctrinal view is coupled with the rule of law found within the United States Supreme Court case of Weaver vs. Graham, 450 U.S. 24, 67 L.Ed.2d 17, 101 S. Ct. 960 (1981), wherein it is held impermissible for a state to enact any law which imposes a punishment for an act which is not punishable at the time it was committed, or to impose additional punishment to that which was then prescribed, then it is reasonable to conclude that ambiguous language within the context of statutes affecting prison sentencing is to be beneficially interpreted.

Senate Bill 2294 of the 1993 Regular Legislative Session was enacted to amend Section MCA 47-7-3 to provide that certain inmates shall receive priority for placement in any education development or job training program prior to parole. Subsection (1)(c) of the Bill brought forward the original language of the paragraph, but periodically added the phrase, "or sentences".

The subsection, with amendment, appears thusly,

"(c) No one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowances, in which case he shall be eligible for parole if he has served (i) nine (9) months of his sentence or sentences, when his sentence or sentences is two (2) years or less; (ii) ten (10) months of his

sentence or sentences when his sentence or sentences is more than two (2) years but no more than five (5) years; and (iii) one (1) year of his sentence or sentences when his sentence or sentences is more than five (5) years;..."

It is important to again note within this subsection, now amended, that the word sentence (singular) is accompanied by "or sentences" which indicates inclusion of the plural, or more than one sentence. This additional phrase is similar to the phraseology used in paragraph (1) of that same section, Section 47-7-3, which uses "term or terms for which such prisoner was sentenced." As discussed earlier, the phrase, "term or terms of sentence," was referred to as being plural by the June 22, 1992 - Roy Perkins - opinion of the Attorney General. It is both reasonable and consistent with the prior opinions to simply apply constructive statutory agreement by using the plural "or sentences" in the same vein as "or terms of sentence" to include plural (multiple) events. In so doing, ambiguousness is erased and a clear meaning emerges which allows us to properly construe the subsection.

With this understanding, it can now be said that subsection (1)(c) means that on or after July 1, 1993, the effective date of Senate Bill 2294, that no one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowances, in which case he shall be eligible for parole if he has served (i) nine (9) months of his sentence or sentences (multiple), when his sentence or sentences (multiple) is two (2) years or less; (ii) ten (10) months of his sentence or sentences (multiple) when his sentence or sentences (multiple) is more than (2) years but no more than five (5) years; and (iii) one (1) year of his sentence or sentences (multiple) when his sentence or sentences (multiple) is more than five (5) years;...

Further reaction for a clearer meaning allows us to read the subsection in this manner: (1)(c) No one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowances, in which case he shall be eligible for parole if he has served (i) nine (9) months of his (multiple) sentences, when his (multiple) sentences is (are) two (2) years or less; (ii) ten (10 months of this (multiple) sentences when his (multiple) sentences is (are) more than two (2) years but no more than five (5) years; and (iii) one (1) year of his (multiple) sentences when his multiple sentences is (are) more than five (5) years; ...

Consequently, the abbreviated meaning of the subsection may be determined to simply be: To be eligible for parole, a prisoner must serve at lease one year of his sentence unless he has accrued earned time allowance which would allow parole eligibility according to the following:

(i) for sentences totalling two years or less - nine (9) months;

(ii) for sentences totalling more than two years but no more than five years - ten (10) months; and

(iii) for sentences totalling more than five years - one (1) year.

However, there are certain other necessary restrictions placed upon parole eligibility by other subsections of MCA Section 47-7-3 which are not discussed here because the focus of your inquiry was upon the proper application of the amendment made to subsection (1)(c).

We believe that the above is sufficient to explain the answers to your questions in that, (1) on or after July 1, 1993, the Department of Corrections should compute parole eligibility pursuant to subsection (1)(c) of MCA section 47-7-3, by combining the total of consecutive sentences whenever the prisoner has accrued any meritorious earned time allowances; and (2) such computation should apply to all inmates provided it is beneficial to the individual and is otherwise not a punishment for an act which is not punishable at the time it was committed, nor imposes additional punishment to that which was then prescribed. Weaver v. Graham, supra.

I trust this is responsive to your inquiry.

Sincerely,

MIKE MOORE, ATTORNEY GENERAL

By:
R. Steven Coleman
Special Assistant Attorney General

RSC:eje

ATTACHMENT: Opinions of June 22, 1992;
June 12, 1986; and
August 19, 1985

06-22-92

Mr. Eddie Lucas
Commissioner
Mississippi Dopartment of Corrections
723 North President Street
Jackson, Mississippi 39202

Re: Senate Bill 2030,
1992 Regular Legislative Session

Dear Mr. Lucas:

Attorney General Mike Moore has received your request for an opinion and has assigned it to the undersigned for research and reply. In your letter, you state:

1. If an inmate was sentenced to the Mississippi Department of Corrections prior to Senate Bill 2030 becoming law, is it legally permissible for such inmate to remain in an Earned Time Class as allowed under the old law? Was it the legislative intent to abolish Earned Time Classes completely as of May 14, 1992?

2. Specifically, if an inmate was sentenced to the Mississippi Department of Corrections prior to May 14, 1992, can the Agency legally allow the inmate to receive an earned time allowance of one-half (1/2) of the period of confinement imposed by the court plus any meritorious earned time he may have earned or must the Agency continue to provide the inmate with earned time credit under the old Earned Time Class system until they are officially discharged from the Mississippi Department of Corrections?

3. Subsection 2 of Section 47-5-138 in Senate Bill 2030 provides in part that "if an inmate commits a violation felonious in nature, he may forfeit all or part of the earned time allowance upon the written order of the commissioner". My question is as follows: Is the Agency authorized to forfeit earned time allowance of an inmate for any other justified reason other than for an act felonious in nature?

4. Finally, Subsection (2) of Section 47-5-139 in Senate Bill 2030 provides that "an

offender under two or more consecutive sentences shall be allowed computation based upon the total term of the sentences". In regard to this, my questions are as follows:

(a) If an individual is sentenced to two (2) consecutive life sentences, is he required to serve ten (10) years on each life sentence before being eligible for parole or would such individual be eligible for parole after ten (10) years service?

(b) If an individual is sentenced by the court to life and a definite term of sentence (life and 30 years consecutive), would such person be required to serve only ten (10) years on the life sentence plus ten (10) years on the thirty year sentence?

In response to question number 1, it is our opinion that it is the intention of the state legislature that earned time classes must be completely abolished as of May 14, 1992 which is the date Senate Bill 2030 became law; and, inmates shall not remain in earned time classes after May 14, 1992. See Section 47-5-139, Mississippi Code of 1972, as amended. Accordingly, it is the opinion of our office that it is not legally permissible for inmates to remain in earned time classes after May 14, 1992 because there is no statutory authority.

In response to question number 2, Senate Bill 2030 states, in part, that "an inmate shall be eligible to receive an earned time allowance of one-half (1/2) of the period of confinement imposed by the court except those inmates excluded by law". See Section 47-5-139(1), Mississippi Code of 1972, as amended, for those inmates that are not eligible for the earned time allowance. The bill further states, "The department shall determine a conditional earned time release date by subtracting the earned time allowance from an inmate's term of sentence and shall prepare a conditional earned time release date for each inmate." Under former Section 47-5-138(1), the maximum earned time allowances and/or meritorious earned time allowances were one-half (1/2) of the period of time imposed by the court. As the new earned time allowance totals one-half (1/2) of the period of confinement imposed by the court, no inmate could have received a greater reduction under prior law. Since the legislature has completely abolished earned time classes, no state inmate shall be granted any earned time credit after May 14, 1992 under the earned time classes that were in existence prior to such date. Therefore, it is the opinion of our office that the Department of Corrections is required by law to grant

all eligible inmates, regardless of the date of being committed to the department, an earned time allowance of one-half (1/2) of the period of confinement imposed by the court plus any meritorious earned time authorized by the Commissioner of Corrections. The meritorious earned time shall be awarded pursuant to Section 47-5-142, Mississippi Code of 1972, as amended.

With reference to question number 3, I must make reference to a prior opinion issued by our office dated September 1, 1989 to former Corrections Commissioner, Dr. Lee Roy Black. (See attached.) In that opinion, we stated, in part, that the Classification Committee is given the responsibility to make decisions and hear evidence in all cases where an offender is subject to being demoted or having earned time taken from him. See Section 47-5-104. Under Section 47-5-138 (2) before May 14, 1992, the Commissioner of Corrections or his designee could suspend an inmate from receiving earned time for a specified period and could forfeit up to one-half (1/2) the earned time allowance of an inmate for a serious violation of prison rules. Since May 14, 1992, the effective date of Senate Bill 2030, if an inmate commits a violation felonious in nature, he may forfeit all or part of the earned time allowance upon the written order of the commissioner. Accordingly, it is the opinion of our office that earned time may only be forfeited if an inmate commits a violation felonious in nature and for any escape under Section 47-5-139(3).

In response to question number 4 (a) and (b), I must make reference to another prior opinion issued by our office dated June 12, 1986 to Mr. Morris L. Thigpen, a former Commissioner of the Department of Corrections. (See attached). My response to question 4 (a) is that an individual with two (2) consecutive life sentences must serve ten (10) years on each sentence before he is eligible for parole. See: Ezra Prater v. State of Mississippi, 579 So.2d 569 (Miss. 1991) and Section 47-7-3(1). With reference to question 4 (b), an individual serving a life sentence and thirty (30) years consecutive must likewise serve ten (10) years on each sentence before he is eligible for parole.

I trust this is responsive to your inquiry.

Sincerely,

Mike Moore, Attorney General

By: Roy A. Perkins
Special Assistant Attorney General

MM/RAP:jb
Attachments

SENTENCE COMPUTATION DATA SHEET

NAME GARLOTTE, HARVEY
NO. X60710
SMCI
P. O. BOX 1419
LEAKSVILLE, MS 39451

TOTAL TERM OF SENTENCE LIFE

DATE OF SENTENCE 9-16-1985

JAIL TIME RECORD 5DAYS & 102DAYS & 1DAY

SENTENCE BEGAN 9-11-1985/6-1-1985/5-31-1985

MAXIMUM DISCHARGE DATE LIFE

EARNED TIME ALLOWANCES (50% SENTENCE) 1YR. 6MONTHS

M.E.T. ALLOWANCE 180DAYS
(MET forfeited shall not be restored nor shall it be re-earned by the offender)

EXECUTIVE TIME ALLOWANCE

TIME OUT ON ESCAPE CREDIT ALLOWED FROM (DATE)

TIME OUT ON PAROLE

CREDIT ALLOWED FROM(DATE)

EARNED TIME FORFEITED

MET FORFEITED

EARLIEST PAROLE ELIGIBILITY DATE 12-2-1995

EARLIEST CONDITIONAL DISCHARGE DATE LIFE

EXCLUSIONS:

1. LIFE SENTENCE (X)
2. HABITUAL OFFENDER ( )
3. EARNED TIME ALLOWANCE FORFEITED BY ORDER OF THE COMMISSIONER: ( )
4. SEX OFFENDER(S) DENIED PAROLE BASED ON PSYCHOLOGICAL/PSYCHIATRIC EXAMINATION: ( )
5. MANDATORY ARMED ROBBERY SENTENCE ( )

CONDITIONS:

TIME COMPUTATION OF CONSECUTIVE SENTENCE IS BASED ON EACH INDIVIDUAL SENTENCES.

NO INMATE IN ANY EVENT SHALL HAVE HIS SENTENCE TERMINATED BY ADMINISTRATIVE EARNED TIME ACTION UNTIL HE IS ELIGIBLE FOR PAROLE.

11-13-1992PS
DATE

APPENDIX-T

(MS.) CHRISTINE HOUSTON
CHIEF RECORDS OFFICER

SENTENCE COMPUTATION DATA SHEET

NAME Harvey Garlotte

NO X60710
Unit 29
Parchman, Ms. 38738

TOTAL TERM OF SENTENCE LIFE & LIFE CC/63 yrs.CS=LIFE

DATE OF SENTENCE 9-16-1985

JAIL TIME RECORDED 5 & 102 & 1 days

SENTENCE BEGAN 9-11-1985/6-1-1985/5-31-1985

MAXIMUM DISCHARGE DATE LIFE

EARNED TIME RECORD

Class IV 8-22-1988 (00000) Class III (8 days per mo.)

Class II (20 days per mo.) Class I 9-1-1988 (30 days per mo.)

Disciplinary Action On RVR #202-12(9-2-18)

APPLICABLE TO CLASS II AND CLASS III RESIDENTS, ONLY

EARNED TIME AS RECORDED THROUGH

Total Amount of Time Accumulated

Current Discharge Date

MERITORIOUS EARNED TIME

Days Credited

Posting Period

Total MET Applied

Maximum amount of time that can be accumulated if continuously confined 481 days.

Between 10-16-1985 and 2-3-1987

EARLIEST POSSIBLE DISCHARGE DATE IF CONTINUOUSLY CONFINED: LIFE

Time lost for Disciplinary Action days

Total amount of time lost on this sentence days.

Earned Time Restored days Total Earned Time Restored on sentence days.

THE AMOUNT OF EARNED TIME ACCUMULATED IS CONTINGENT UPON:

1. Class Status
2. Continuous confinement
3. Disciplinary Action (loss of earned time, stoppage and/or class demotion)
4. Conditions applicable to sentence under State Statute, (this applies to certain drug charges, armed robbery and attempted armed robbery offenses.)
5. No earned time can be accumulated if sentenced as an habitual offender.

IMPORTANT:

The above information is based on your present status and is subject to change at any given time. Earned time will be discontinued the date of release and your discharge date will be adjusted to allow you only the amount of time that could be accumulated prior to release.

PAROLE ELIGIBILITY DATES

Minimum Time Required by Statute 5-1-1996 . PRESUMPTIVE PAROLE DATE

SER 999999 . (Parole Board Action) .

WR 9999999 .

Fine, Court Cost, Restitution Outstanding

This must be paid or an acceptable schedule of payment submitted to the Court prior to release on the above date. Failure to comply with the Orders of the Court in this regard could result in service of maximum term of sentence.

Director of Records
Records Department
Mississippi State Penitentiary
Parchman, Mississippi 38738

Date October 19, 1988 nb

APPENDIX-U

PS

SENTENCE COMPUTATION RECORD

NUMBER X60710

NAME CARLOTTE, HARVEY COUNTY MARION/LAMAR

DATE OF ARREST

DATE RELEASED ON BOND

TERM OF SENTENCE:

LIFE & LIFE CC &

3YRS. CS

NUMBER OF DAYS JAIL TIME ALLOWED 5DAYS & 102DAYS & 1DAY

DATE RECEIVED 10-1-1985

DATE OF SENTENCE 9-16-1985

SENTENCE BEGIN 9-11-1985/6-1-1985/5-31-1985

TOTAL SENTENCE

LIFE

MAXIMUM DISCHARGE DATE LIFE

Minimum Discharge Date on 3 year sentences (NOT TO BE DISCHARGED PRIOR TO 8 MOS. CONFINEMENT.)

DATE	CLASS	CREDITS ALLOWED	CREDITS FORFEITED	CREDITS RESTORED	SER DATE	EARLIEST WORK-RELEASE DATE	EARLIEST PAROLE DATE	DISCHARGE DATE
9-16-1985		50% OF	THREE(3 YR)SENTENCE		SENATE BILL #2030		9-11-1986	3-11-1987
7-1-1986		ADDITIONAL 102DAYS JAIL TIME FROM					6-1-1986	11-29-1986
9-4-1986		6-6-1985 TO 12-1-1984 ADDITIONAL 1DAY JAILTIME ALLOWED FROM 12-10-1984 TO 12-11-1934					5-31-1986	11-28-1986
11-13-1992		180DAYS MERITORIOUS EARNED TIME					12-2-1985	6-1-1986
9-16-1985		ADDITIONAL LIFE & LIFE CC SENTENCE					12-2-1995	LIFE

94-6790

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

NO. _____

HARVEY F. GARLOTTE,
PETITIONER

VS.

KIRK FORDICE,
RESPONDENT

Supreme Court, U.S.
FILED
NOV 7 1994
OFFICE OF THE CLERK

PROOF OF SERVICE

I, Harvey F. Garlotte, do hereby certify that I have this date, November 3rd, 1994, caused a true and correct copy of the accompanying Motion for Leave to Proceed In Forma Pauperis, Petition for Writ of Certiorari, and Motion for Appointment of Counsel, to be mailed to the Honorable Mike Moore, Mississippi Attorney General and counsel for the Respondent, Kirk Fordice, at P.O. Box 220, Jackson, MS 39205-0220, via United States Postal Service, First Class Postage prepaid, by delivering those pleadings to the prison law librarian for mailing.

I hereby affirm under penalty of perjury that the above facts and matters are true and correct as stated herein.

Harvey F. Garlotte

Harvey F. Garlotte, pro se
X60710, SMCI U-14
P.O. Box 1419
Leakesville, MS 39451

9

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
DEC 30 1994
OFFICE OF THE CLERK

NO. 94-6790

IN THE UNITED STATES SUPREME COURT

OCTOBER 1994 TERM

HARVEY F. GARLOTTE *Petitioner*

versus

KIRK FORDICE *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
Counsel of Record

JO ANNE M. McLEOD
SPECIAL ASSISTANT ATTORNEY GENERAL
Of Counsel

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

QUESTION PRESENTED

1. Where a petitioner received consecutive sentences for possession of marijuana with intent to deliver and for two counts of murder and the sentencing order provided that three-year marijuana sentence be served before the two life sentences, petitioner was no longer "in custody" when habeas petition was filed, federal courts are without jurisdiction to consider issue and certiorari should be denied.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Course of Proceedings and Disposition in Courts Below 2

B. Statement of Fact 7

REASONS FOR DENYING THE WRIT 7

ARGUMENT 8

CONCLUSION 15

CERTIFICATE 16

TABLE OF AUTHORITIES

Cases *Page*

Bernard v. Garraghty, 934 F.2d 52 (4th Cir. 1991) . . 11, 12

Fawcett v. Bablitch, 962 F.2d 617 (7th Cir. 1992) . . .11

Garlotte v. Fordice, 29 F.3d 216 (5th Cir., 1994) 6, 7, 13, 14

Garlotte v. State, 530 So.2d 693 (Miss. 1988), rehearing denied September 28, 1988 3

McNally v. Hill, 293 U.S. 131 (1934) 8, 10, 11

Maleng v. Cook, 490 U.S. 488 (1989) 11, 13, 14

Peyton v. Rowe, 391 U.S. 54 (1968) 8, 9, 10, 11, 12

OTHER AUTHORITIES

28 U.S.C.A. Section 1254(1). 1

Constitution of the United States, Article IV, §2, cl. 1 and Amendment XIV. 2

Rule 58, Fed.R.Civ.P. 6

28 U.S.C. §2254. 6

NO. 94-6790
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

HARVEY F. GARLOTTE *Petitioner*

versus

KIRK FORDICE *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Respondent, Kirk Fordice, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied in this case.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported as ***Garlotte v. Fordice***, 29 F.3d 216 (5th Cir., 1994). A copy of this opinion is before this Court as Appendix A to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. Section 1254(1). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Article IV, §2, cl. 1 and Amendment XIV.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below:

On September 16, 1985, Petitioner-Appellant, Harvey F. Garlotte entered pleas of guilty to one count of marijuana possession in an amount less than an ounce with intent to deliver and to two counts of murder. He was subsequently sentenced to a term of three (3) years pursuant to the marijuana charge and two concurrent life sentences pursuant to the charges of murder. The concurrent life sentences were to run consecutive with the three (3) year sentence imposed for marijuana possession. Although three (3) separate pleas were entered on September 16, 1985, the present appeal is targeted exclusively at the plea of guilty to marijuana possession.

Garlotte filed in the Circuit Court of Lamar County, Mississippi, a motion to vacate his plea of guilty to marijuana possession, which the lower court denied as being "plainly" without merit on November 3, 1986.

On May 18, 1987, petitioner appealed the denial of post-conviction relief to the Mississippi Supreme Court, alleging the following:

I.

The record presently before this Court is incomplete.

II.

The trial court erred in overruling appellant's motion to vacate his conviction.

III.

The trial court did not follow rule 3.03 of the Uniform Rules of Circuit Court Practice because it failed to determine there was a factual basis for the plea.

IV.

Appellant was deprived of the effective assistance of counsel because counsel failed to request a mental examination to determine appellant's competency to stand trial at the time he entered his plea.

V.

Appellant's plea of guilty was the product of undue influence by legal authorities and misleading information.

On August 10, 1988, the Mississippi Supreme Court denied the "facially meritless motion for post-conviction relief" in a written opinion. ***Garlotte v. State***, 530 So.2d 693 (Miss. 1988), rehearing denied September 28, 1988.

On or about October 20, 1989, petitioner sought relief by means of a Petition for Writ of Habeas Corpus with the United States District Court for the Southern District of Mississippi, Hattiesburg Division, alleging the following:

A. The trial court erred in accepting petitioner's guilty plea and did not adequately establish and ensure that petitioner's plea was voluntary, intelligent and knowing.

B. Petitioner was denied effective assistance of counsel in that his attorney:

1. Failed to see that original plea bargain was followed.

2. Failed to request a mental examination.

3. Failed to inform him of the realities of trial by jury.

4. Did not ensure petitioner's guilty plea as voluntary or intelligently and knowingly entered.

5. Failed to inform petitioner of possible defenses to charge.

6. Knew that petitioner's guilty plea was being entered involuntarily.

7. Had reason to believe that the indictment was obtained in an unconstitutional manner, yet made no attempt to attack the indictment.

8. Knew that he, the attorney, was laboring under an actual conflict of interest but made no attempt to resolve this problem.

9. Failed to prepare an interlocutory appeal to the denial of the Motion to Suppress the Evidence, and failed to inform petitioner such an appeal could be made.

10. Failed to argue the unusual and disproportionate sentence.

11. Failed to inquire of the court how intent element of charge was/would be established and to make the court aware of petitioner's lack of conscious control of substance and petitioner's previous guilty plea to lesser included offense within city court.

12. Failed to perform and function as the advocate and counsel guaranteed under the Mississippi and United States

Constitutions.

C. The trial court lacked jurisdiction to entertain and/or accept petitioner's guilty plea.

D. Petitioner was subjected to double jeopardy.

E. Petitioner's sentence was unusual and disproportionate.

F. Petitioner's guilty plea was the product of undue influence/coercion and/or misleading information.

G. Petitioner was incompetent at the time of the guilty plea.

H. Petitioner's guilty plea was not knowing, intelligent and voluntary.

I. Petitioner was denied full and fair consideration of his *pro se* pleadings by the Mississippi Courts.

On November 17, 1989, respondents filed a Motion to Dismiss for Failure to Exhaust, and on August 29, 1990, the magistrate recommended that the habeas petition be dismissed without prejudice. On June 25, 1991, upon reviewing an Order from the Mississippi Supreme Court, the District Court remanded the matter to the Magistrate Judge "for reconsideration". Respondents, on July 29, 1991, filed a Brief on Remand submitting that petitioner "seem[ed] to have exhausted his state court remedies", stating:

> The reason for the failure of the state to discover these two grounds[1] is that they were not included in the application to the Mississippi Supreme Court, but in the proposed filing before the circuit court. This proposed filing was attached as the ninth

---

[1]The two grounds were: (1) Petitioner was subjected to double jeopardy and (2) Petitioner's sentence was unusual and disproportionate.

exhibit and appeared, without careful reading, to be part of the prior pleadings filed in another case.

On February 13, 1992, the magistrate judge[2], after reviewing the case on its merits, filed his Report and Recommendation, and recommended that the petition for writ of habeas corpus be denied.

On February 19, 1992, respondent filed Respondent's Clarification of Exhaustion Issue in Report and Recommendation of United States Magistrate Judge.

On June 3, 1992, the District Court fully reviewed the magistrate judge's report, the objections of petitioner, and the response filed by respondents and adopted the Report and Recommendation as the finding of the Court, dismissing the habeas petition, and judgment was entered as required by Rule 58, Fed.R.Civ.P.

On August 4, 1993, the Court of Appeals for the Fifth Circuit ordered the district court to supplement the record with the state's Brief on Remand. On March 3, 1994, a certificate of probable cause was granted by the Fifth Circuit.

On August 19, 1994, the Fifth Circuit affirmed the district court's dismissal, but on the separate ground of the district court's lack of jurisdiction pursuant to 28 U.S.C. §2254. ***Garlotte v. Fordice***, 29 F.3d 216 (5th Cir. 1994).

---

[2]At this point, the instant case had been assigned to all three Southern District magistrate judges at different times.

B. **Statement of Fact**:

In ***Garlotte v. Fordice***, 29 F.3d 216 (5th Cir. 1994) the court summarized the facts as follows:

> In 1985 Garlotte pleaded guilty to one count of possession with intent to deliver or sell one ounce or less of marijuana and was sentenced to three years imprisonment. On the same day he pleaded guilty to two counts of murder and received two life sentences which the court ordered to run concurrently. The court also ordered that the concurrent life sentences were to run "consecutive, and after" the three year marijuana conviction. Garlotte did not appeal his marijuana conviction, and his two state post-conviction motions were denied. He is currently eligible for parole consideration on March 1, 1996.
>
> In 1989, Garlotte filed a federal petition for *habeas corpus* relief challenging the 1985 marijuana conviction. Fordice filed a motion to dismiss for failure to exhaust state habeas remedies, and the magistrate judge recommended that the petition be dismissed with prejudice. The district court remanded the matter to the magistrate for reconsideration.
>
> On remand, the magistrate recommended dismissing the petition without requiring Fordice to file an answer, concluding that although it was unclear whether Garlotte had exhausted his state remedies, even if they were unexhausted the requirement should be waived because exhaustion would be futile. After reviewing the magistrate's Report and Recommendation, the district court adopted it, dismissed the petition, and denied Garlotte's request for a Certificate of Probable Cause.

Garlotte, 29 F.3d at 217.

REASONS FOR DENYING THE WRIT

The Fifth Circuit properly affirmed the district court's dismissal of the writ for lack of jurisdiction as petitioner no longer met the "in custody" requirement at the time the petition was filed. Petitioner presents no cognizable claim

under the Constitution or statutes of the United States upon which relief can be granted, therefore certiorari should be denied.

ARGUMENT

Where a petitioner received consecutive sentences for possession of marijuana with intent to deliver and for two counts of murder and the sentencing order provided that three-year marijuana sentence be served before the two life sentences, petitioner was no longer "in custody" when habeas petition was filed, federal courts are without jurisdiction to consider issue and certiorari should be denied.

The Fifth Circuit properly ruled that Garlotte was not "in custody" for his 1985 marijuana conviction when he filed his petition for habeas corpus relief.

In ***Peyton v. Rowe***, 391 U.S. 54 (1968), this Court addressed what is sufficient to constitute being "in custody" for habeas corpus purposes. ***Peyton*** looked to ***McNally v. Hill***, 293 U.S. 131 (1934), which discussed whether a district court may entertain a petition for a writ of habeas corpus from a prisoner incarcerated under consecutive sentences when he claims that a sentence he is scheduled to serve in the future is constitutionally invalid. In ***McNally***, the Court found that a petition for relief from such a sentence was premature. This determination was reached in light of the federal habeas corpus statutes's failure to define "in custody" and prior Supreme Court decisions regarding habeas corpus. ***McNally***, 293 U.S. at 138.

In ***Peyton*** the court noted that a federal writ of habeas

corpus was "substantially a post-conviction device which could afford prompt adjudication of factual as well as legal issues." ***Peyton***, 391 U.S. at 60. The Court emphasized that prompt adjudication of habeas corpus claims was imperative and further emphasized that allowance of collateral attacks on future sentences was required because "dimmed memories or the death of witnesses is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact." ***Id***. at 62. Regarding challenges to future sentences via habeas corpus, the Court stated:

> Of course prejudice to meritorious claims resulting from the kind of delay which ***McNally*** imposes is not limited to situations involving ineffective assistance of counsel. To name but a few examples, factual determinations are often dispositive of claims of coerced confession; lack of competency to stand trial; and denial of a fair trial. Postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice. As the Court of Appeals observed:
>
> > Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the Commonwealth of Virginia may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial. The greater lapse of time the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary. It is to the great interest of the Commonwealth and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established. 383 F.2d at 715.

Peyton, 391 U.S. at 62-63 [citations omitted].

The ***Peyton*** Court found ***McNally*** inconsistent with the purposes underlying the writ of habeas corpus and, consequently, overruled ***McNally***: "[w]e overrule ***McNally*** and hold that a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of Section 2241 (c)(3)" ***Id.*** at 67.

The net result is that a prisoner "in custody" under one sentence may, after ***Peyton***, attack a sentence he is scheduled to serve in the future. The reasoning provided by the Peyton Court concerning its overruling of ***McNally*** was that "postpon[ing] of plenary consideration of issues by the district courts undermines the character of the writ of habeas corpus as the instrument for resolving fact issues not adequately developed in the original proceedings." ***Id.*** at 63. The ***Peyton*** Court therefore determined that an interpretation of 28 U.S.C. Section 2241's "in custody" language which would include consecutive sentences imposed, but not yet served, would eliminate the "inconsistencies between purposes and practice which flow from the ***McNally*** holding." ***Id.***. at 65.

The reasoning relied upon by this Court in ***Peyton*** and the problems it sought to remedy are equally applicable to the situation in which a prisoner waits until the sentence which he attempts to assail has expired before bringing his habeas corpus petition. ***Peyton***, in fact, specifically set forth as a prejudicial situation the very claim Garlotte now pursues, that he was coerced into entering a guilty plea. "[I]f the

allegations of his petition are false in fact, the [state] may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial." ***Id***. at 62, quoting appellate court opinion. The prejudice which results from the passage of time is at odds with the purposes of the writ, whether this time will pass before the petition may be filed or has already passed before the petition is filed.

The "in custody" language of the statute does not allow challenges to past confinements. In ***Maleng v. Cook,*** 490 U.S. 488 (1989), the Supreme Court held that after a sentence has fully expired, a habeas petitioner is no longer "in custody" merely because the prior conviction will be used to enhance a sentence imposed for subsequent crimes for which petitioner may be convicted. ***Id.*** at 492. Garlotte's three years sentence for his conviction of marijuana possession in an amount less than an ounce with intent to deliver clearly expired before 1989, the time he filed his petition.

Two other circuits have taken a contrary position, holding that the "in custody" issue, as regards expired sentences is governed by ***Peyton***. ***Fawcett v. Bablitch***, 962 F.2d 617 (7th Cir. 1992) cites ***Peyton v. Rowe, supra***, in a conclusory fashion, for the proposition that a prisoner in custody on any of consecutive sentences is in custody on all of them. ***Bernard v. Garraghty***, 934 F.2d 52 (4th Cir. 1991) contains some discussion of the facts and rationale of ***Peyton***, but concludes

that the difference between Rowe's attempt to challenge a sentence he was scheduled to serve in the future and Bernard's attempt to challenge a consecutive sentence he had already served was "irrelevant." ***Id.*** at 55. ***Bernard*** further claims ***Peyton*** held "dispositive the fact that the Virginia parole statute provided that Rowe's parole eligibility was to be determined on the basis of an aggregate sentence of fifty years, the total of his thirty-year and twenty-year sentences." ***Id.*** at 55. While the ***Peyton*** Court did address that statute it did so merely as regards the need for habeas petitioners to be able to attack sentences scheduled to be served in the future because of the prejudice their claims may suffer due to passage of time.

In the case *sub judice*, Garlotte argues that this Court's decision in ***Peyton v. Rowe***, 391 U.S. 54 (1968) controls this case. The Fifth Circuit points out in it's opinion affirming the district court's dismissal that:

> Garlotte does not challenge Fordice's contention that his three year marijuana sentence has expired, but argues instead that the Supreme Court's decision in ***Peyton v. Rowe***, 391 U.S. 54, holding that a prisoner serving consecutive sentences is "in custody" under any one of the sentences, controls this case. Garlotte further argues that there exists a "positive and demonstrable" nexus between his current custody under the murder sentences and the prior marijuana conviction such that his challenge meets the jurisdictional requirements of § 2254. ***Willis v. Collins***, 989 F.2d 187 (5th Cir. 1993), quoting ***Young v. Lynaugh***, 821 F.2d 1133, 1137 (5th Cir. 1987), *cert. denied*, 484 U.S. 986, 108 S.Ct. 1040, 98 L.Ed.2d 501 (1987), and *cert. denied*, 484 U.S. 1071, 108 S.Ct. 1040, 98 L.Ed.2d 1004 (1988). Specifically he contends that but for his marijuana conviction, he would have been eligible

for parole consideration on June 5, 1995, instead of March 1, 1996.[3]

This Court has held that a petitioner can challenge a fully expired sentence if the expired sentence delayed the time for which the petitioner could receive credit for time served on the current sentence. ***Capetta v. Wainwright***, 406 F.2d 1238, 1239 (5th Cir.), *cert denied*, 396 U.S. 846, 90 S.Ct. 55, 24 L.Ed.2d 96 (1969). Since ***Capetta***, however, the Supreme Court stated in ***Maleng***:

> We have never held, however, that a habeas petitioner may be "in custody" under a conviction when the sentence imposed for that conviction has fully expired at the time the petition is filed.

Maleng, 490 U.S. at 491, 109 S.Ct. at 1925 (emphasis in original).

Garlotte, 29 F.3d at 218. The Fifth Circuit followed the rule established by ***Maleng*** in Garlotte's case, at least to the extent that ***Maleng*** and ***Capetta*** are inconsistent.

The Fifth Circuit, in affirming the district court's dismissal of the writ of habeas corpus, stated:

> In ***Peyton***, the Supreme Court held that a petitioner who was serving consecutive sentences imposed by the state court is "in custody" under any one of those sentences. ***Peyton***, 391 U.S. at 67, 88 S.Ct. at 1556. Unlike Garlotte, however, the petitioners in ***Peyton*** were challenging a sentence they had not yet begun to serve. Garlotte attempts only to challenge a sentence that is "fully expired" under the definition established by the Supreme Court in ***Maleng***. Therefore, Garlotte's challenge to his "fully expired" marijuana conviction is not controlled by the Supreme Court's decision in ***Peyton*** because he is not attempting to challenge a sentence he has not yet begun to serve.

---

[3]According to the Mississippi Department of Corrections, Records Department, the petitioner's earliest parole eligibility date is December 2, 1995. Attached please find petitioner's Sentence Computation Data Sheet provided by the Mississippi Department of Corrections.

Garlotte, 29 F.3d at 218. The Court went on to explain that Garlotte's contention, that because his parole consideration date was delayed by the marijuana conviction the requisite nexus between the marijuana conviction and the murder conviction existed, was without merit.

Citing ***Maleng***, the Fifth Circuit found that because "Garlotte's parole delay merely constitutes a collateral consequence of his marijuana conviction, he has failed to allege a 'positive and demonstrable' nexus between the marijuana conv ction and the murder sentences he is not serving in order to meet the requirement of the ***Maleng*** exception established by this Court in ***Willis***." ***Garlotte v. Fordice***, 29 F.3d 216, 218.

Clearly, the Fifth Circuit in ***Garlotte v. Fordice***. 29 F.2d 216, followed long established precedent in arriving at its conclusion that Garlotte was not "in custody" for purposes of subject matter jurisdiction.

CONCLUSION

Because the Court of Appeals for the Fifth Circuit properly dismissed the petitioner's habeas corpus petition due to lack of subject matter jurisdiction, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MIKE MOORE, ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above **Brief in Opposition** to the following:

Harvey F. Garlotte
MSP #X60710, SMCI Unit 14
Post Office Box 1419
Leakesville, Mississippi 39451

This the 30th day of December, 1994.

MARVIN L. WHITE, JR.

SENTENCE COMPUTATION DATA SHEET

NAME CARLOTTE, HARVEY

NO. X60710

SMCI

P. O. BOX 1419

LEAKSVILLE, MS 39451

TOTAL TERM OF SENTENCE LIFE

DATE OF SENTENCE 9-16-1985

JAIL TIME RECORD 5DAYS & 102DAYS & 1DAY

SENTENCE BEGAN 9-11-1985/6-1-1985/5-31-1985

MAXIMUM DISCHARGE DATE LIFE

EARNED TIME ALLOWANCES (50% SENTENCE) 1YR. 6MONTHS

M.E.T. ALLOWANCE 180DAYS
(MET forfeited shall not be restored nor shall it be re-earned by the offender)

EXECUTIVE TIME ALLOWANCE

TIME OUT ON ESCAPE CREDIT ALLOWED FROM (DATE)

TIME OUT ON PAROLE

CREDIT ALLOWED FROM(DATE)

EARNED TIME FORFEITED

MET FORFEITED

EARLIEST PAROLE ELIGIBILITY DATE 12-2-1995

EARLIEST CONDITIONAL DISCHARGE DATE LIFE

EXCLUSIONS:

1. LIFE SENTENCE (X)
2. HABITUAL OFFENDER ( )
3. EARNED TIME ALLOWANCE FORFEITED BY ORDER OF THE COMMISSIONER: ( )
4. SEX OFFENDER(S) DENIED PAROLE BASED ON PSYCHOLOGICAL/PSYCHIATRIC EXAMINATION: ( )
5. MANDATORY ARMED ROBBERY SENTENCE ( )

CONDITIONS:

TIME COMPUTATION OF CONSECUTIVE SENTENCE IS BASED ON EACH INDIVIDUAL SENTENCES.

NO INMATE IN ANY EVENT SHALL HAVE HIS SENTENCE TERMINATED BY ADMINISTRATIVE EARNED TIME ACTION UNTIL HE IS ELIGIBLE FOR PAROLE.

11-13-1992PS
DATE

(MS.) CHRISTINE HOUSTON
CHIEF RECORDS OFFICER

AFFIDAVIT OF SERVICE OF PROCESS

I, Marvin L. White, Jr., being duly sworn, state the following:

1. I am a member of the bar of this Court and I am counsel for the Respondent in this action.

2. On December 30, 1994, I personally placed the original and twelve (12) copies of the enclosed Brief In Opposition to the Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the case of Harvey F. Garlotte v. Kirk Fordice, No. 94-6790, in a package properly addressed to the Clerk of this Court, with first-class postage prepaid, and deposited the package in a mailbox under the exclusive control, care and custody of the United States Postal Service within the City and State of Jackson, Mississippi.

3. I placed a copy of said Brief In Opposition in an envelope properly addressed to Harvey F. Garlotte, MSP #X60710, SMCI Unit 14, Post Office Box 1419, Leakesville, MS 39451.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

SWORN TO AND SUBSCRIBED BEFORE ME this, the 30th day of December, 1994.

Carolyn B. Carter
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Sept. 11, 1995

STATE OF MISSISSIPPI

OFFICE OF THE ATTORNEY GENERAL

RECEIVED
JAN - 3 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MIKE MOORE
ATTORNEY GENERAL

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION DIVISION

December 30, 1994

Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Dear Mr. Suter:

Please find enclosed for filing the original and twelve (12) copies of Respondent's Brief In Opposition. By copy of this letter, I am forwarding a copy of this brief to the petitioner.

Thank you for your assistance in this matter.

Sincerely,

Marvin L. White, Jr.
Assistant Attorney General

MLW:jr/dsm

Enclosures

cc: Harvey F. Garlotte

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FILED
MAR 1 1995
CLERK

No. 94-6790

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HARVEY F. GARLOTTE,
Petitioner,
v.
KIRK FORDICE, Governor of Mississippi,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 7, 1994
CERTIORARI GRANTED JANUARY 20, 1995

TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries	1
Respondent's Brief on Remand (served July 29, 1991)	3
Report and Recommendation of the United States Magistrate Judge Regarding Petitioner's Habeas Petition (signed Feb. 13, 1992)	5
Order of United States District Court Adopting Magistrate's Report and Recommendation (signed June 3, 1992)	18
Judgment of United States District Court Dismissing Petition (signed June 3, 1992)	19
Respondent's Clarification of Exhaustion Issue in Report and Recommendation of United States Magistrate (filed Feb. 24, 1992)	20
Order of Fifth Circuit Granting Certificate of Probable Cause (filed March 3, 1994)	23
Garlotte v. Fordice, 29 F.3d 216 (5th Cir. 1994)	25
Transcript of Proceedings:	
Plea Allocution in the Circuit Court of Lamar County, Mississippi (Sept. 16, 1985)	30
Letter from the Honorable Michael R. Eubanks, Mississippi Circuit Judge, to H. Garlotte (April 24, 1986)	51
Sentence Computation Data Sheet, H. Garlotte (Oct. 19, 1988)	52
Sentence Computation Data Sheet, H. Garlotte (Nov. 13, 1992)	53
Sentence Computation Record for H. Garlotte (undated)	54
Order of Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, January 20, 1995	55

RELEVANT DOCKET ENTRIES

United States District Court,
Southern District of Mississippi

October 19, 1989	— Petition for Habeas Corpus
November 20, 1989	— Respondents' Motion to Dismiss for Failure to Exhaust State Remedies
November 29, 1989	— Petitioners' Response to Respondents' Motion to Dismiss for Failure to Exhaust
August 30, 1990	— Report and Recommendation that Petition for Writ of Habeas be Dismissed without Prejudice
September 20, 1990	— Petitioner's Objections to Report and Recommendation
June 27, 1991	— Order Remanding Matter to United States Magistrate for Reconsideration
February 18, 1992	— Report and Recommendation that Petition for Writ of Habeas be Denied
February 24, 1992	— Respondents' Clarification of Exhaustion Issue
June 4, 1992	— Order Adopting United States Magistrate Report and Recommendation that Petition for Writ of Habeas be Dismissed
June 4, 1992	— Judgment Dismissing With Prejudice Petition for Writ of Habeas
June 15, 1992	— Petitioner's Notice of Appeal
June 15, 1992	— Petitioner's Motion for Certificate of Probable Cause
August 4, 1992	— Order of United States District Court that Certificate of Probable Cause Should Not Issue

RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Fifth Circuit

March 7, 1994 — Order of Fifth Circuit Granting Petitioner's Motion for Certificate of Probable Cause

September 13, 1994 — Slip Opinion of Fifth Circuit Affirming District Court but on Different Ground that District Court Lacked Jurisdiction Pursuant to 28 U.S.C. § 2254

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

Civil Action No. H89-0187(P)

HARVEY P. GARLOTTE,
Petitioner

versus.

RAY MABUS, GOVERNOR, *et al.*,
Respondent

BRIEF ON REMAND

COMES NOW the respondent in the above styled and numbered cause and files this brief on the question of whether or not petitioner has exhausted his state court remedies.

After further review of the prior filings of petitioner before the Mississippi Supreme Court respondent has discovered that petitioner did if fact raise the grounds found in Ground IV (Petitioner was subjected to double jeopardy) and Ground V (Petitioner's sentence was unusual and disproportionate). The reason for the failure of the state to discover these two grounds is that they were not included in the application to the Mississippi Supreme Court, but in the proposed filing before the circuit court. This proposed filing was attached as the ninth exhibit and appeared, without careful reading, to be part of the prior pleadings filed in another case.

Present counsel apologizes for this oversight and would not submit that petitioner seems to have exhausted his state court remedies.

Wherefore, PREMISES CONSIDERED, respondents respectfully move this Court allow it twenty days from the entry of an appropriate order to file its answer to this petition for writ of habeas corpus.

Respectfully submitted,

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State of Mississippi

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(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

(Title Omitted in Printing)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Harvey Floyd Garlotte pled guilty to the crime of possession of less than one ounce of marijuana with intent to deliver or sell in the Circuit Court of Lamar County, Mississippi on September 16, 1985. He was previously arraigned for the crime December 10, 1984, in Marion County, and his case was assigned to Lamar County on his own motion. Garlotte also pled guilty to two counts of murder on the same day, but he does not now challenge these convictions herein. Garlotte was sentenced to a three-year term in the custody of the Mississippi Department of Corrections for the crime of possession of marijuana with intent to deliver or sell.

Garlotte appealed his conviction directly to the Mississippi Supreme Court, and that court affirmed in *Garlotte v. State*, 530 So.2d 693 (Miss. 1988). After filing several more unsuccessful post-conviction motions, Garlotte then filed his writ for habeas corpus with this court. The State filed its Motion to Dismiss for Failure to Exhaust on November 20, 1989, and a Report and Recommendation was entered by the Magistrate on August 30, 1990, recommending dismissal. The District Judge entered an Order on June 27, 1991, remanding the case to the Magistrate for reconsideration.

Although it is unclear whether or not Garlotte has exhausted his state court remedies on all of his alleged grounds for relief, it appears that a return to the state

courts may prove futile. Thus, it is our recommendation that the exhaustion requirement be waived and that Garlotte's petition be considered on the merits.

Garlotte alleges that his conviction is "illegal and void" based on the following grounds which entitle him to relief:

> 1. The Trial Court erred in accepting Petitioner's guilt plea and did not adequately establish and ensure that Petitioner's plea was voluntary, intelligent and knowing.
>
> 2. Petitioner was denied effective assistance of counsel.
>
> 3. The trial court lacked jurisdiction to entertain and/or accept the Petitioner's guilty plea.
>
> 4. Petitioner was subjected to double jeopardy.
>
> 5. Petitioner's sentence was unusual and disproportionate.
>
> 6. Petitioner's guilty plea was the product of undue influence/coercion and/or misleading information.
>
> 7. Petitioner was incompetent at the time of the guilty plea.
>
> 8. Petitioner's guilty plea was not knowing, intelligent and voluntary.[1]
>
> 9. Petitioner was denied full and fair consideration of his *pro se* pleadings by the Mississippi Courts. (sic)

Garlotte's *primary* attack on his conviction is his allegation that his guilty plea was unlawful for numerous different reasons. Ground Nos. 1, 2, 3, 4, 6, 7, and 8 are all related to the lawfulness of Garlotte's guilty plea, and we shall consider the merits of these grounds as a whole.

---

[1] This ground is essentially identical to Ground No. 1.

We have examined the transcript from the lower court's hearing whereby Garlotte entered his plea of guilty to this crime. We agree with the Mississippi Supreme Court's statement in the direct appeal of this case that "Judge Eubanks conducts one of the most thorough and explicit plea hearings this Court has had the opportunity to read. . . . The issues raised by Garlotte are without merit, totally refuted by the lengthy and explicit record of the guilty plea." *Garlotte,* 530 So.2d at 694.

Judge Eubanks explained in detail to Garlotte his rights to plead not guilty and have a trial; he questioned Garlotte thoroughly as to whether the plea was freely and voluntarily given and whether or not anyone had coerced or pressured him. As to competency, when Garlotte mentioned his past alcohol and drug problems, Judge Eubanks questioned him in detail as to how long it had been since he had used alcohol and whether it was out of his system or still affecting his judgment. Garlotte confirmed that he was no longer under the influence as he had not used any drugs or alcohol in three months. The court interrogated him regarding his educational background, determining that he had completed his high school degree (by GED) and could read and write. The Judge had the opportunity to examine the demeanor of Garlotte and could form an opinion as to whether he was competent; the record certainly confirms the judge's decision.

The record indicates that the Judge *affirmatively* found that Garlotte was competent, that the plea was freely and voluntarily given, that no coercion was involved, and that Garlotte understood his rights.

A plea of "guilty" to a charge has a profound effect on subsequent events in a criminal proceeding. In *Boykin v. Alabama,* 395 U.S. 238, 242 (1969), the Supreme Court held that a guilty plea to a criminal charge is "more than admission of conduct; it is a conviction." *See also, Swift v. Lynn,* 870 F.2d 1039, 1041 (5th Cir. 1989);

Long v. McCotter, 792 F.2d 1338, 1345 (5th Cir. 1986). Such a plea waives several federal constitutional rights, such as the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Long*, 792 F.2d at 1345. A valid guilty plea waives all nonjurisdictional defects preceding the plea. *United States v. Jennings*, 891 F.2d 93, 95 (5th Cir. 1989); *See also, United States v. Harper*, 901 F.2d 471, (5th Cir. 1990). In *Tollett v. Henderson*, 411 U.S. 258 (1972), the court held that:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

Id. at 267 (*citing McMann v. Richardson*, 397 U.S. 759 (1970); *Cook v. Lynaugh*, 821 F.2d 1072, 1075 (5th Cir. 1987).[2]

The United States Supreme Court established in *Boykin* that as a matter of due process the court record in criminal proceedings must affirmatively disclose that a guilty plea was entered voluntarily and intelligently. *See also, Gillard v. Scroggy*, 847 F.2d 1141, 1143 (5th Cir. 1988). In *Boykin*, the court reversed a criminal conviction based upon a guilty plea where the record was "wholly silent" on whether the judge asked the defendant any questions or whether the defendant ever addressed the court. *Boykin*,

---

[2] The court, in reaching its conclusion in *Tollett*, relied on a trilogy of cases decided in 1970. *See Brady v. U.S.*, 397 U.S. 742 (1970) (guilty pleas allegedly entered to avoid possibility of death penalty); *McMann v. Richardson*, 397 U.S. 759 (1970) (confession allegedly coerced); *Parker v. North Carolina*, 397 U.S. 790 (1970) (guilty plea allegedly entered to avoid possibility of death penalty).

395 U.S. at 240. The rule governing acceptance of guilty pleas has three core concerns: the plea must be free from coercion, the accused must understand the nature of the charges against him, and the accused must know the direct consequences of his guilty plea. *United States v. Stumpf,* 900 F.2d 842, 844 (5th Cir. 1990). The lower court's interrogation of Garlotte, along with Garlotte's responses, clearly show that these criteria were met.

The court must advise the defendant of the maximum sentence he can receive, and the transcript affirmatively shows that this was done in Garlotte's hearing. *United States v. Daniel,* 830 F.2d 46, 47 (5th Cir. 1987). However, the Supreme Court held in *Hill v. Lockhart,* 474 U.S. 52, 55-56 (1985), that in order for a guilty plea to be valid and binding, a trial court is not required to inform a criminal defendant of collateral consequences that might result from the conviction based on the guilty plea. *See also, Johnson v. Puckett,* 930 F.2d 445 (5th Cir. 1991). In *Hill,* the court affirmed that the procedures for ensuring that guilty pleas are knowingly and intelligently entered are outlined in Rule 11(c), Federal Rules of Criminal Procedures, and the court stated that the Constitution does not require the states to inform defendants about collateral matters such as parole eligibility. *Id.* Furthermore, a defendant who has been advised of the maximum prison term he might receive is fully aware of the consequences of his guilty plea. *Barbee v. Ruth,* 678 F.2d 634 (5th Cir. 1982). Letter perfect compliance with the rule concerning acceptance of guilty pleas is not demanded. *Stumpf, supra,* at 844 *citing United States v. Corbett,* 742 F.2d 173 (5th Cir. 1984).

The record of the guilty plea hearing affirmatively discloses that Garlotte's plea was voluntarily and intelligently made as required by *Boykin.* Many of the complaints Garlotte makes regarding his plea were waived by him due to the plea itself under the foregoing law. It is our opinion that all of the grounds alleged by Garlotte regard-

ing his competency and the voluntariness of the plea are without merit.

Garlotte also attacks his guilty plea by alleging in Ground No. 3 that the trial court had no jurisdiction to entertain his plea due to the invalidity of the indictment. He concludes (without a supporting factual basis) that the indictment was "detained in a deceitful and malicious manner"; the indictment was not signed by the circuit clerk; the grand jury was not properly empaneled; the indictment was "falsified and altered by the district attorney without leave of court"; the grand jury "was not charged concerning the law in relation to the facts"; the grand jury "was not charged with its duties and obligations as an impartial and unbiased judicial body as required by law"; and, the indictment "did not reflect on its face the true weight of the marijuana".

The sufficiency of a state indictment is not a matter for federal habeas corpus relief unless it can be shown that the indictment is so defective that the convicting court had no jurisdiction. *Alexander v. McCotter,* 775 F.2d 595, 598 (5th Cir. 1985) *citing Liner v. Phelps,* 731 F.2d 1201, 1203 (5th Cir. 1984); *Johnson v. Puckett,* 930 F.2d 445 (5th Cir. 1991). For an indictment to be "fatally defective," no circumstances can exist under which a valid conviction could result from the facts provable under the indictment with state law providing the reference point for determining an indictment's sufficiency. *Johnson,* 930 at 447; *Johnson v. Estelle,* 704 F.2d 232, 236 (5th Cir. 1983) *cert. denied,* 465 U.S. 1009, 104 S.Ct. 1006, 79 L.Ed.2d 237 (1984). However, if the question of the sufficiency of the indictment is presented to the highest state court of appeals, then consideration of the question is foreclosed in federal habeas corpus proceedings. *Liner v. Phelps,* 731 F.2d at 1203. Furthermore, in *Alexander v. McCotter, supra,* the United States Court of Appeals for the Fifth Circuit held that:

> An indictment is sufficient if it (1) contains the elements of the offense charged and fairly informs the defendant of the charge against him and (2) enables him to plead an acquittal or conviction and bar a future prosecution for the same offense.

Alexander, 775 F.2d at 599, *citing United States v. Montemayor*, 703 F.2d 109, 117 (5th Cir. 1983).

In Mississippi, all questions regarding the sufficiency of an indictment are determined by reference to Rule 2.05, Uniform Criminal Rules of Circuit Court Practice. *Thames v. State*, 454 So.2d 486, 487 (Miss. 1984). Also, an indictment which tracks the statutory language is generally sufficient to inform the accused of the charge against him. *Cantrell v. State*, 507 So.2d 325, 329 (Miss. 1987); *Cummins v. State*, 515 So.2d 869, 872 (Miss. 1987); *Hickombottom v. State*, 409 So.2d 1337, 1338 (Miss. 1982).

We have reviewed the allegations regarding the indictment in this matter and find that Garlotte's indictment was not so defective under the above discussed law to deprive the convicting court of jurisdiction over the cause. Some of Garlotte's allegations are merely conclusory in nature and are without a factual basis.

Garlotte alleges that he had previously pled guilty to the marijuana possession charge in city court and that the instant conviction violated the Double Jeopardy Clause of the United States Constitution. The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U. S. Constitution, Article V. It protects against three different evils: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 359 U.S. 711, 717 (1969). We find Garlotte's argument on this ground to be without merit, as he offers no supporting facts to vali-

date his conclusion that the two guilty pleas were for the same offense. Further, his guilty plea conviction in this case may have waived any such assertion.

Garlotte also argues in his Ground No. 2 that he was denied effective assistance of counsel. We point out that the transcript reflects the following testimony of Judge Eubanks and Garlotte:

> Q. Now, Mr. Bubba Holder here is your attorney?
> A. Yes, sir.
> Q. And he's here in the Courtroom with you, and you have employed him to represent you on these cases?
> A. Yes, sir.
> Q. Now, has he discussed this indictment with you?
> A. Yes, sir.
> Q. Has he discussed with you what needs to be done to defend you on these cases?
> A. Yes, sir.
> Q. All right, did he go over with you what yours rights were on these charges?
> A. I'm not real sure about that one.
> Q. Well, I'm going to go over with you again and so you will understand about them before you enter your plea, but he has discussed the cases and what needs to be done to defend you in these cases?
> A. Yes, sir.
> Q. And you've discussed those in detail with him?
> A. Yes, sir.
> Q. And have you given him the information he needs to properly advise you and represent you on these charges?
> A. Yes, sir.
> Q. All right, you're not holding back any information from him?
> A. No, sir.
> Q. Now, has he taken sufficient time to go over everything with you?
> A. Yes, sir, I believe he has.

Q. Are you satisfied with his services?
A. Yes, sir.
Q. Do you know of anything else that you would want him to do to defend you on these three charges?
A. No, sir.

In order to establish effective assistance of counsel with regard to a guilty plea, *Hill v. Lockhart*, 474 U.S. 52, 58 (1958), holds that the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), must be met. *See also, Williams v. Smith*, 888 F.2d 28, 30 (5th Cir. 1989); *United States v. Green*, 882 F.2d 999, 1002 (5th Cir. 1989); *United States v. Smith*, 844 F.2d 203, 208 (5th Cir. 1988).

In *Strickland*, the Supreme Court held that before post-conviction relief can be granted for ineffective assistance of counsel, the petitioner must establish: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that this deficient performance prejudiced the defense such that there is a reasonable probability that the outcome of the trial has been undermined and the result would have been different. *Strickland*, 466 U.S. at 687, 688; *See also, United States v. Samples*, 897 F.2d 193, 196 (5th Cir. 1990); *Lavernia v. Lynaugh*, 845 F.2d 493 (5th Cir. 1988); *Bridge v. Lynaugh*, 838 F.2d 770 (5th Cir. 1988); *Thomas v. Lynaugh*, 812 F.2d 225 (5th Cir. 1987). Thus, both a deficiency and resulting prejudice must be shown. *United States v. Lewis*, 786 F.2d 1278, 1281 (5th Cir. 1986). A petitioner's failure to establish both prongs of the *Strickland* test warrants rejection of his claim. *Bates v. Blackburn*, 805 F.2d 569, 578 (5th Cir. 1986).

Under the deficiency prong of the *Strickland* test, a petitioner must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687; *see also, Bridge v. Lynaugh*, 838 F.2d 770, 773

(5th Cir. 1988). However, the Fifth Circuit has noted the following:

> In determining whether counsel's performance satisfies the requirements of the Sixth Amendment, we must inquire whether, considering all of the circumstances, counsel's performance was reasonable under prevailing professional norms. Judicial scrutiny of counsel's performance must be highly deferential; we must make every effort to eliminate the distorting effects of hindsight and evaluate the conduct from counsel's perspective at the time.

Lavernia v. Lynaugh, 845 F.2d 493, 498 (5th Cir. 1988). In applying the first *Strickland* criterion, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional competence, or that, under the circumstances, the challenged action might be considered sound trial strategy. *Bridge v. Lynaugh*, 838 F.2d at 773 *quoting Strickland v. Washington*, 466 U.S. at 689; *Samples*, 897 F.2d at 196. Finally, counsel is given great deference with a strong presumption that counsel has exercised reasonable professional judgment. *Martin v. McCotter*, 796 F.2d 816, 817 (5th Cir. 1986).

In *Hill*, *supra*, the Court stated that in the context of guilty pleas, the first half of the *Strickland* test is nothing more than a restatement of the standard of attorney competence set forth in *Tollett v. Henderson*, 411 U.S. 258 (1973) and *McMann v. Richardson*, 397 U.S. 759 (1970). Both of those decisions hold that where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. *See*, *Hill*, 474 U.S. at 56.

The petitioner must also affirmatively prove "prejudice" in order to meet the *Strickland* test. *Byrne v. Butler*, 845

F.2d 501, 512 (5th Cir. 1988) (citations omitted). In the guilty plea context, "prejudice" occurs if there is a reasonable probability that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. *United States v. Smith*, 844 F.2d 203, 209 (5th Cir. 1988); *See also, Czere v. Butler*, 833 F.2d 59, 63 (5th Cir. 1987); *Uresti v. Lynaugh*, 821 F.2d 1099, 1101 (5th Cir. 1987). In the instant case, Garlotte has not even alleged that he would have insisted on going to trial.

In our opinion, Garlotte has not met his burden of proving ineffective assistance of counsel under the *Strickland* test and the law as discussed above, and we recommend that no relief be granted on this ground.

Garlotte also alleges in his Ground No. 5 that his three-year sentence, which was the maximum jail sentence allowed under Mississippi law, is unusual and disproportionate. In *Rummel v. Estelle*, 445 U.S. 263 (1980), the Supreme Court stated that "whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy." *Rummel*, 445 U.S. at 283, n.27, *citing Gore v. United States*, 357 U.S. 386, 393 (1958); *see also, Hutto v. Davis*, 454 U.S. 370, 374 (1982).

Moreover, the Supreme Court has held that a reviewing court should not consider the severity of a sentence that has been set within statutory limits, particularly on habeas corpus review. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). The Fifth Circuit has stated, that "while not reviewing the severity of a sentence, this court will, however, carefully scrutinize the judicial process by which punishment was imposed." *United States v. Cimino*, 659 F.2d 535, 537 (5th Cir. 1982); *see also, United States v. Clements*, 634 F.2d 183, 186 (5th Cir. 1981); *United States v. Cauazos*, 530 F.2d 4, 5 (5th Cir. 1976); *Smith v. Wainwright*, 664 F.2d 1194, 1196 (11th Cir. 1976);

United States v. Fay, 267 F.2d 507, 510 (2nd Cir. 1959). As long as the trial court stays within statutory bounds and respects procedural safeguards, the sentence may be reversed only for arbitrary or capricious abuse of discretion. *United States v. Wheeler*, 802 F.2d 778, 783 (5th Cir. 1986); *United States v. Garcia*, 693 F.2d 412, 415 (5th Cir. 1982).

The three-year sentence which Garlotte received was the maximum jail sentence for his crime, but he was not *fined* as the law allowed. Thus, the lower court did not impose the maximum sentence. The record of the guilty plea clearly shows that the trial court was not acting in an arbitrary or capricious manner; in fact, the court was merely honoring the plea bargain agreement entered into by the district attorney and Garlotte. Extenuating circumstances obviously existed when Garlotte's attorney attempted to plea bargain as to his sentence—he was also plea bargaining and being sentenced on two murder charges contemporaneously with this marijuana possession charge.

Since the sentence was within the bounds of Mississippi law and the trial judge was not acting in an arbitrary or capricious manner in imposing the maximum jail sentence, Garlotte is not entitled to any habeas relief based on his sentence.

As his last ground for relief, Garlotte alleges that he was denied full and fair consideration of his *pro se* pleadings by the Mississippi courts. It is clear that to maintain a petition for habeas corpus, the petitioner must be deprived of some right secured to him by the Constitution or the laws of the United States. *Irving v. Thigpen*, 732 F.2d 1215, 1216 (5th Cir. 1983) (citing 28 U.S.C. § 2254(a) (1982); *Baker v. McCollan*, 443 U.S. 137 (1979); *Trussell v. Estelle*, 699 F.2d 256, 259 (5th Cir. 1983)). We are of the opinion that this ground does not present a constitutional issue and, thus, is frivolous for the purposes of habeas relief.

Due to all of the above reasons, it is our opinion that Garlotte is not entitled to relief from this court. We recommend that his petition for writ of habeas corpus be denied.

Parties are hereby notified that failure to file written objections to the findings and recommendations contained in this report within ten days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

This the 13th day of February, 1992.

/s/ Alfred G. Nicols, Jr.
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

(Title Omitted in Printing)

ORDER

This cause came on this date to be heard upon the Report and Recommendation of the United States Magistrate Judge, after referral of hearing by this Court, and the Court, having fully reviewed the Report and Recommendation of the United States Magistrate Judge entered in this cause on or about February 13, 1992, the objections filed by Petitioner, the Response filed by Respondents, and being otherwise fully advised in the premises, finds that said Report and Recommendation should be adopted as the opinion of this Court.

IT IS, THEREFORE, ORDERED that the Report and Recommendation of United States Magistrate Judge Alfred G. Nicols, Jr. entered on or about February 13, 1992, be, and the same is hereby adopted as the finding of this Court, and the petition for writ of habeas corpus is hereby dismissed.

A separate judgment will be entered herein in accordance with this Order as required by Rule 58, Fed.R.Civ.P.

SO ORDERED AND ADJUDGED this the 3rd day of June, 1992.

/s/ Charles W. Pickering, Sr.
CHARLES W. PICKERING, SR.
United States District Judge

[Filed Jun. 4, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

(Title Omitted in Printing)

JUDGMENT

This matter having come on to be heard on this date upon the Report and Recommendation of the United States Magistrate Judge entered in this cause on or about February 13, 1992, and the Court, after a full review of the record, having adopted said Report and Recommendation as the finding of the Court by Order dated June 3rd, 1992, finds that this matter should be dismissed.

IT IS THEREFORE, ORDERED AND ADJUDGED that this cause be, and the same is hereby dismissed with prejudice.

SO ORDERED AND ADJUDGED this the 3rd day of June, 1992.

/s/ Charles W. Pickering, Sr.
CHARLES W. PICKERING, SR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

(Title Omitted in Printing)

RESPONDENT'S CLARIFICATION OF EXHAUSTION ISSUE IN REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

COMES NOW respondent and files this clarification of its position on the exhaustion issue included in the above styled and numbered cause.

In his Report and Recommendation in this case the Magistrate Judge made the following statement:

> Although it is unclear whether or not Garlotte has exhausted his state court remedies on all of his alleged grounds for relief, it appears that a return to the state court may prove futile. *Thus, it is our recommendation that the exhaustion requirement be waived and that Garlotte's petition be considered on the merits.* [Emphasis added.]
>
> R. & R. at 2.

This confusion arises from our Brief on Remand filed on July 29, 1991, after this case was remanded to the Magistrate Judge by the District Court for reconsideration. In earlier responses we claimed that Grounds IV and V were not exhausted. On review of the filings by new counsel we discovered that these claims had in fact been exhausted by petitioner. We stated in that document:

> Present counsel apologizes for this oversight and would *not* submit that petitioner seems to have exhausted his state court remedies. [Emphasis added.]
>
> Brief on Remand at 1.

The word *not* was a typographical error and the phrase should read "and would *now* submit that petitioner seems to have exhausted his state court remedies." This was intended as a submission that the state was waiving the exhaustion issue.

As is clear from the rulings of the United States Supreme Court in *Castille v. Peoples*, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 379 (1989) and *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) the issue of exhaustion is waivable by the state. However, if the State refuses to waive the issue then the habeas petition must be dismissed as a mixed petition and the petitioner allowed to repair to the state courts to exhaust the unexhausted claims. This is a decision that is the State's to make and not one for the federal courts unless it appears that such would be futile. Of course, a claim can be considered exhausted because it is clearly barred from consideration under state law. It would be futile to return to state court because the state courts would refuse to consider it because it is procedurally barred. This claim is then considered exhausted and the claim must be treated as a claim barred from consideration by the federal courts. *Castille v. Peoples*, 103 L.Ed.2d at 387.

So that there is no confusion in this case that may come back to haunt the resolution of this petition, the State would submit that petitioner has exhausted the claims that he now raises.

We file this brief not as an objection to the Report and Recommendation of the Magistrate Judge, but to clarify the State's position on the issue of exhaustion of petitioner's state court remedies.

Respectfully submitted,

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Attorney General
State of Mississippi

MARVIN L. WHITE, JR.
Assistant Attorney General
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(Certificate of Service Omitted in Printing)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7396

HARVEY F. GARLOTTE,
Petitioner-Appellant,

versus

KIRK FORDICE, Governor,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. CA-H89-0187(P)(N)

ORDER:

Harvey F. Garlotte moves this Court for a certificate of probable cause (CPC). Garlotte argues that the district court prematurely dismissed his petition without requiring the respondent to file an answer and without conducting an evidentiary hearing.

Rule 4 of the Rules Governing Section 2254 Cases permits the district court to dismiss the petition without requiring the state to respond only if the claims are frivolous, or it appears from the face of the petition that the petitioner is not entitled to relief. *McNeil v. Blackburn*, 802 F.2d 830, 833 (5th Cir. 1986). In his petition Garlotte alleged, *inter alia*, that his guilty plea was involuntary and that he was denied effective assistance of counsel. If Garlotte is able to prove these allegations he may be entitled to habeas relief. *See McNeil*, 802 F.2d at 832-33 (when a defendant pleads guilty on the basis of a promise by defense counsel or the prosecutor,

breach of the promise, even if the promise is unfulfillable, taints the voluntariness of the plea). The district court did not advert to these specific allegations.

Therefore, IT IS ORDERED that Garlotte's motion for CPC is GRANTED. IT IS FURTHER ORDERED that the respondent brief the issue whether the district court prematurely dismissed the petition without requiring an answer and without conducting an evidentiary hearing. *See McNeil*, 802 F.2d at 833; *Tijerina v. Estelle*, 692 F.2d 3, 5-6 (5th Cir. 1992) (an evidentiary hearing is required only if factual disputes cannot be resolved on the record).

/s/ John M. Duhé, Jr.
JOHN M. DUHÉ, JR.
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

(Title Omitted in Printing)

Appeal from the United States District Court
for the Southern District of Mississippi

Aug. 19, 1994

Before SMITH, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

Petitioner Harvey F. Garlotte ("Garlotte") brings a *habeas corpus* action pursuant to 28 U.S.C. § 2254, challenging a 1985 state conviction for possession of marijuana. The district court, adopting the magistrate judge's Report and Recommendation, dismissed the petition for failure to exhaust state remedies without requiring the respondent to file an answer. We granted Garlotte's request for a Certificate of Probable Cause, ordering Respondent Kirk Fordice ("Fordice") to brief the issue whether the district court prematurely dismissed Garlotte's petition without requiring an answer or conducting an evidentiary hearing. Concluding that under recent United States Supreme Court precedent Garlotte was not "in custody" for purposes of § 2254, we affirm the district court's dismissal of the petition, but on the separate ground of lack of jurisdiction pursuant to 28 U.S.C. § 2254.

FACTS AND PROCEDURAL HISTORY

In 1985, Garlotte pleaded guilty to one count of possession with intent to deliver or sell one ounce or less of marijuana and was sentenced to three years imprisonment. On the same day he pleaded guilty to two counts of mur-

der and received two life sentences, which the court ordered to run concurrently. The court also ordered that the concurrent life sentences were to run "consecutive, and after" the three year marijuana conviction. Garlotte did not appeal his marijuana conviction, and his two state post-conviction motions were denied. He is currently eligible for parole consideration on March 1, 1996.

In 1989, Garlotte filed a federal petition for *habeas corpus* relief challenging the 1985 marijuana conviction. Fordice filed a motion to dismiss for failure to exhaust state habeas remedies, and the magistrate judge recommended that the petition be dismissed with prejudice. The district court remanded the matter to the magistrate for reconsideration.

On remand, the magistrate recommended dismissing the petition without requiring Fordice to file an answer, concluding that although it was unclear whether Garlotte had exhausted his state remedies, even if they were unexhausted the requirement should be waived bcause exhaustion would be futile. After reviewing the magistrate's Report and Recommendation, the district court adopted it, dismissed the petition, and denied Garlotte's request for a Certificate of Probable Cause.

DISCUSSION

For the first time on appeal, Fordice argues Garlotte's habeas petition should be dismissed for lack of subject matter jurisdiction because he is not "in custody" within the meaning of 28 U.S.C. § 2254. A challenge to subject matter jurisdiction may be raised for the first time on appeal because it may not be waived. *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1180 (5th Cir.1987), *cert. denied*, 493 U.S. 851, 110 S.Ct. 150, 107 L.Ed.2d 108 (1989). Therefore, we address the question of whether Garlotte is "in custody" under the 1985 marijuana conviction.

Federal district courts lack subject matter jurisdiction to entertain § 2254 actions if, at the time the petition is

filed, the petitioner is not "in custody" under the conviction or sentence which the petition attacks. *Maleng v. Cook*, 490 U.S. 488, 491, 109 S.Ct. 1923, 1925, 104 L.Ed.2d 540 (1989); see also *Hendrix v. Lynaugh*, 888 F.2d 336 (5th Cir. 1989). Fordice argues that under *Maleng*, Garlotte is not "in custody" because his three year sentence for marijuana conviction was fully expired before he filed his habeas petition with the district court. Specifically, Fordice contends that according to Garlotte's record at the Mississippi Department of Corrections, he was discharged from the marijuana conviction on June 1, 1986. He did not file his petition for habeas relief in federal court until 1989, after he was already serving time for the two concurrent life sentences for murder. Therefore, because the marijuana conviction he now attacks was not used for enhancement purposes for the concurrent life sentences for murder, and because the marijuana conviction is fully expired, Garlotte is not "in custody" for purposes of § 2254.

Garlotte does not challenge Fordice's contention that his three year marijuana sentence has expired, but argues instead that the Supreme Court's decision in *Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968), holding that a prisoner serving consecutive sentences is "in custody" under any one of the sentences, controls this case. Garlotte further argues that there exists a "positive and demonstrable" nexus between his current custody under the murder sentences and the prior marijuana conviction such that his challenge meets the jurisdictional requirements of § 2254. *Willis v. Collins*, 989 F.2d 187 (5th Cir.1993), quoting *Young v. Lynaugh* 821 F.2d 1133, 1137 (5th Cir.1987), *cert. denied*, 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987), and *cert. denied*, 484 U.S. 1071, 108 S.Ct. 1040, 98 L.Ed.2d 1004 (1988). Specifically, he contends that but for his marijuana conviction, he would have been eligible for parole consideration on June 5, 1995, instead of March 1, 1996.

This Court has held that a petitioner can challenge a fully expired sentence if the expired sentence delayed the time for which the petitioner could receive credit for time served on the current sentence. *Cappetta v. Wainwright,* 406 F.2d 1238, 1239 (5th Cir.), *cert. denied,* 396 U.S. 846, 90 S.Ct. 55, 24 L.Ed.2d 96 (1969). Since *Cappetta,* however, the Supreme Court stated in *Maleng:*

> We have never held, however, that a habeas petitioner may be "in custody" under a conviction when the sentence imposed for that conviction has *fully expired* at the time the petition is filed.

Maleng, 490 U.S. at 491, 109 S.Ct. at 1925 (emphasis in original). Therefore, to the extent that the Supreme Court's decision in *Maleng* is in conflict with this Court's decision in *Cappetta,* we now follow the rule established by *Maleng.*

In *Peyton,* the Supreme Court held that a petitioner who was serving consecutive sentences imposed by the state court is "in custody" under any one of those sentences. *Peyton,* 391 U.S. at 67, 88 S.Ct. at 1556. Unlike Garlotte, however, the petitioners in *Peyton* were challenging a sentence they had not yet begun to serve. Garlotte attempts only to challenge a sentence that is "fully expired" under the definition established by the Supreme Court in *Maleng.* Therefore, Garlotte's challenge to his "fully expired" marijuana conviction is not controlled by the Supreme Court's decision in *Peyton* because he is not attempting to challenge a sentence he has not yet begun to serve.

As for Garlotte's contention that because his parole consideration date has been delayed by the marijuana conviction a nexus exists between the marijuana conviction and the murder conviction, we find that this argument too must fail. As the Supreme Court stated in *Maleng:*

> [O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of

> that conviction are not themselves sufficient to render an individual "in custody" for the purposes of a habeas attack upon it.

Maleng, 490 U.S. at 492, 109 S.Ct. at 1926. Because Garlotte's parole delay merely constitutes a collateral consequence of his marijuana conviction, he has failed to allege a "positive and demonstrable" nexus between the marijuana conviction and the murder sentences he is now serving in order to meet the requirements of the *Maleng* exception established by this Court in *Willis*. Having found that Garlotte is not "in custody" for purposes of subject matter jurisdiction, we decline to address the other issues he raises in his petition. Accordingly, we AFFIRM the district court's dismissal, but on the separate ground of the district court's lack of jurisdiction pursuant to 28 U.S.C. § 2254.

IN THE CIRCUIT COURT
LAMAR COUNTY
STATE OF MISSISSIPPI

#6011-2

STATE OF MISSISSIPPI

versus

HARVEY FLOYD GARLOTTE

IN THE MATTER OF
DEFENDANT'S PLEA OF GUILTY

[2] IN OPEN COURT, SEPTEMBER 16, 1985

DEFENDANT HARVEY FLOYD GARLOTTE, after having been first duly sworn, testified under oath as follows, to-wit:

QUESTIONS BY THE COURT:

Q. All right, state your full name?

A. Harvey Floyd Garlotte, Jr.

Q. Mr. Garlotte, you're aware that you have been charged with possession of marijuana with the intent to deliver or sell one ounce or less, and it was in the Circuit Court of Marion County and was transferred from that Circuit Court over here to Lamar County?

A. Yes, sir.

Q. And that case was set for trial for today?

A. Yes, sir.

Q. It's my understanding that you wish to enter a plea in that matter?

A. Yes, sir.

Q. It's also my understanding that you also wish to enter a plea in Number—Case Number 4230-2 and 4231-2 that are still in the Circuit Court of Marion County?

A. Yes, sir.

Q. And that was charging you with murder in 4230 and the same charge in 4231?

A. Yes, sir.

Q. And it is your desire at this time to enter a plea on those charges?

A. Yes, sir.

Q. All right, now rather than have those charges transferred to Lamar County for the plea, I'm going to allow you to enter your plea in Lamar County, but they are going to remain on the Circuit Court docket of Marion County.

[3] A. Yes, sir.

Q. All right, you have no objections to that?

A. No, sir.

BY THE COURT: All right, Mr. Holder, do you have any objections to that?

BY MR. HOLDER: No, sir.

BY THE COURT: All right, he's going to enter a plea in all three of these charges?

BY MR. HOLDER: That's correct.

BY THE COURT: And do it at one time?

BY MR. HOLDER: That's correct, your Honor.

QUESTIONS BY THE COURT: (Continuing)

Q. All right, how old are you, Mr. Garlotte?

A. Twenty-seven.

Q. Are you married?

A. Yes, sir.

Q. All right, do you have any children?

A. Yes, sir.

Q. All right, what are their ages?

A. Four months and two years.

Q. Now, where do you live?

A. Columbia.

[4] Q. What was your last occupation?

A. Carpenter.

Q. Now, what level of education did you reach?

A. G.E.D.

Q. So you have a high school degree?

A. Yes, sir.

Q. And you can read and write then?

A. Yes, sir.

Q. Now, you have been charged, as I said, in these three charges, two charges of murder and the other charge of possession of a controlled substance. Now, have you read those indictments?

A. Yes, sir.

Q. Did you understand those indictments?

A. Yes, sir.

Q. You understand what a charge is and what an indictment is?

A. Yes, sir.

Q. Now, you understand that an indictment is not evidence of your guilt and cannot be used against you in any way?

A. Yes, sir.

Q. It's just a means of bringing this case for determination of whether you're innocent or guilty of the charge?

A. Yes, sir.

Q. Now, you understand about being under oath?

A. Yes, sir.

Q. And that you can receive a ten year prison sentence if you don't tell me the truth in answer to my questions?

[5] A. Well, I didn't know about the sentence until now, but yes, sir.

Q. Well, I want you to be aware of that anyway because it's very important that you tell me the truth.

A. Yes, sir.

Q. Now, there's another reason that it's important that you tell me the truth and that is that I'm asking you these questions for a reason.

A. Yes, sir.

Q. And the reason is that before you enter your plea, I want to be sure that you understand about your rights, and that whatever plea that you enter is freely and voluntarily entered by you.

A. Yes, sir.

Q. So the only way I can find out that is from what you tell me. I can look at your demeanor and the way you answer my questions, but I still need the information that you tell me yourself in these questions.

A. Yes, sir.

Q. And depending on how you plead, it may be too late to change your answers or remember something else, and so you need to be sure that your answers are accurate and if you do not understand anything, then ask me about it, and I'll try to explain it.

A. Yes, sir.

Q. If you feel like I need some additional information other than the questions I ask you, feel free to volunteer that also.

A. All right.

Q. Now, Mr. Buba Holder here is your attorney.

A. Yes, sir.

[6] Q. And he's here in the Courtroom with you, and you have employed him to represent you on these cases?

A. Yes, sir.

Q. Now, has he discussed this indictment with you?

A. Yes, sir.

Q. Has he discussed with you what needs to be done to defend you on these cases?

A. Yes, sir.

Q. All right, did he go over with you what your rights were on these charges?

A. I'm not real sure about that one.

Q. Well, I'm going to go over with you again and so you will understand about them before you enter your plea, but he has discussed the cases and what needs to be done to defend you in these cases?

A. Yes, sir.

Q. And you've discussed those in detail with him?

A. Yes, sir.

Q. And have you given him the information he needs to properly advise you and represent you on these charges?

A. Yes, sir.

Q. All right, you're not holding back any information from him?

A. No, sir.

Q. Now, has he taken sufficient time to go over everything with you?

A. Yes, sir, I believe he has.

Q. Are you satisfied with his services?

[7] A. Yes, sir.

Q. Do you know of anything else that you would want him to do to defend you on these three charges?

A. No, sir.

Q. Now, it's not going to do much good to look at him because I want to try to find out—I'm asking you the questions there, too. You don't feel like you need any additional time?

A. No, sir.

Q. You don't need any time to go over anything with your family or any friends before entering any plea?

A. No, sir.

Q. If you do, we can give you some additional time because depending on what your plea is, it may be too late later on. Now—

BY MR. HOLDER: Your Honor, could I interrupt. I think what he is hesitating about is that he's had a problem for some time and he's been evaluated to determine exactly what his status was, and I feel like he's capable now to decide whether or not he needs any more time. I think that's why he was hesitate, your Honor.

QUESTIONS BY THE COURT: (Continuing)

Q. All right, let me go into that, Mr. Garlotte. You say you have had in the past a problem?

[8] A. Yes, sir, I've been to the alcoholic treatment center and been under a Psychologist for a while.

Q. What about other drugs? I mean, do you have a narcotic problem, too?

A. Yes, sir, but I've never been to any treatment programs or anything like that, but just for alcohol.

Q. How long has it been since you've been on any drugs or alcohol?

A. Three months.

Q. Do you feel like you've got most of it out of your system?

A. Yes, sir.

Q. And it does not seem to affect you now in understanding me.

A. No, sir.

Q. You can understand me?

A. Yes, sir.

Q. Now, you don't have any emotional or physical handicap or any other type thing like that to keep you from understanding my questions?

A. No, sir.

Q. Or from understanding what we're doing here and what's going on in the Courtroom?

A. No, sir.

Q. All right, it does not appear to me to be that way so I need to be sure of that before you enter your plea. Now, you will be given an opportunity on each of these charges, each one separately, to plead either guilty or not guilty.

[9] A. Yes, sir.

Q. Those are your two choices, and whatever you decide, we want to be sure that you're the one that makes that decision.

A. Yes, sir.

Q. Now, if you plead not guilty, you have certain rights. One of those rights is to have a fair and impartial jury to decide whether you're innocent of the charge or guilty of the charge.

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. And we will be sure that you have an impartial jury and one of the reasons that we had this other case transferred over here to be tried today was to be sure of that. You understand that?

A. Yes, sir.

Q. Now, in this County we were going to have a panel of thirty or forty people, and they were selected at random from around this County, and they were going to come in and sit on the main panel, and we would select twelve jurors from that panel to hear your case.

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. In selecting those twelve, you have the right to dismiss any six of them without giving a reason. You just may not like their occupation or how they comb their hair or something of that nature, and you can have those dismissed. You understand that?

A. Yes, sir.

[10] Q. Additionally, you can have others dismissed where you might show that they would lean one way or the other or against you in some way.

A. Yes, sir.

Q. And so we will impanel a jury, and that jury will not have any preconceived notions about the matter, and they will limit their consideration in this case to just the evidence that comes out at the trial. You understand that?

A. Yes, sir.

Q. They won't even consider this indictment as evidence against you, and that's another one of your rights. You have the right to be presumed innocent of these charges until you either plead guilty to them or a jury finds you guilty.

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. Now, with that right, requires the State—they have the burden of proving you guilty of the charge, and you do not have to prove anything yourself. You don't even have to prove yourself innocent. They have to prove you guilty. You understand that?

A. Yes, sir.

Q. That's their burden, and they have to prove it beyond a reasonable doubt. Now, no one really knows what a reasonable doubt is, but if a juror has a reasonable doubt about your guilt, then that juror could not find you guilty. You understand that?

A. Yes, sir.

Q. In fact, they would have to find you not guilty. They would have to—if someone had a reasonable [11] doubt, then they would have to vote not guilty. You understand that?

A. Yes, sir.

Q. Now, as the case proceeds to trial, the State will put their witnesses on and other evidence that they may have, and your attorney, Mr. Holder, will be there to protect your interest, and he will be there to protect your rights, and he's a very good Criminal Trial attorney, and he knows the rules of evidence and the rules of procedure and law so that he will protect your rights. Are you aware of that?

A. Yes, sir.

Q. Additionally, I'm not here representing the prosecution or representing you. I'm here to be sure that everyone's rights are protected in this trial, and I will even be sure your rights are protected. You understand that?

A. Yes, sir.

Q. Now, what Mr. Holder will do is when some evidence is offered for this jury that is not proper, such as maybe hearsay evidence, what somebody told somebody else or if you had given a statement and it wasn't freely and voluntarily given by you, then he would object to that evidence and this jury would not consider that evidence at this trial. You understand that?

A. Yes, sir.

Q. Now, additionally, he will be there to cross examine their witnesses to show that they are not telling the truth or that they just don't know anything about the matter. You understand that?

A. Yes, sir.

[12] Q. So at the conclusion of the State's case, then you have the right to put your own case on. You can subpoena witnesses with Mr. Holder's help or other documents or anything like that to show that you are innocent of this charge. You understand that?

A. Yes, sir.

Q. Additionally, you can get on the witness stand like you are now and testify to the jury, but also one of your rights is you have the right against self-incrimination and so no one can make you testify. The only way you would be able to testify is if you wanted to.

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. Now, at the conclusion of the trial, the jury will retire for the verdict, and they will consider only the evidence that's come out at the trial and only the law that applies to that evidence, which I will give them, and then if they have a reasonable doubt about your guilt, then they have to come back and vote not guilty, and you would be discharged. You understand that?

A. Yes, sir.

Q. In other words, even if one of them had a reasonable doubt, the others could not find you guilty. In other words, it takes all twelve of them to either find you guilty or not guilty. You undertsand that?

A. Yes, sir.

Q. So if one of them has a reasonable doubt, and the other eleven say they have no doubt, then that would be what we call a hung jury. There would be no verdict in that case, and we would try you again. You understand that?

[13] A. Yes, sir.

Q. Now, additionally, though, if they were to find you guilty, you have a right to appeal that to the Mississippi Supreme Court, and it's an automatic right. No one can take that away from you, and your attorney, Mr. Holder, would be there to assist you in that appeal. You understand that?

A. Yes, sir.

Q. And if—even if you could show me through your attorney that there had been some error during the trial and the jury found you guilty, then we would set aside that verdict of guilt and give you a new trial. You understand that?

A. Yes, sir.

Q. So all throughout this procedure your rights will be protected. You understand that?

A. Yes, sir.

Q. All right, now if you were to plead guilty, however, to these charges, there would be no need for a trial. You would be found guilty, and there would not be any jury determination and the State wouldn't have to prove you guilty, and there would be nothing to appeal from, and that would be the end of it, and additionally, you would be giving up your right against self-incrimination. If you pled guilty, you might have to testify about this incident. You understand that?

A. Yes, sir.

Q. Now, have you been advised as to what the maximum penalty is on each one of these?

A. I believe three years on the marijuana and life on each of the others.

[14] Q. That's what you were advised?

A. Yes, sir.

BY THE COURT: Now, Mr. Douglass, is that your understanding?

BY MR. DOUGLASS: With the only exception being a fine on marijuana, but because of his situation, I don't imagine he would be able to pay that.

QUESTIONS BY THE COURT: (Continuing)

Q. All right, you understand about there's a fine, too?

A. Yes, sir.

Q. The fine in this case would be up to three thousand dollars. Now, you are aware, too, that those can be run one on top of the other?

A. Yes, sir.

Q. You understand what I mean by that?

A. Yes, sir.

Q. Now, if you plead guilty on these charges, the District Attorney's office may make a recommendation for a sentence, and in fact, we've had several here today—have you been in the Courtroom when we've had the pleas today?

A. No, I—

Q. You didn't hear about that?

A. No, sir.

Q. Well, in those cases, I think one of them, they pled without the District Attorney's office even making a recommendation, and in the other one, I think they did [15] make a recommendation. So you understand that they may do either one of those?

A. Yes, sir.

Q. I'm not sure what they are going to do or what they are going to recommend, but that is only a recommendation.

A. Yes, sir, it's ultimately up to you.

Q. Right, that's correct. What kind of sentence you get and how that sentence is served is going to be left up to me.

A. Yes, sir.

Q. And your attorney can't promise you you're going to get a set sentence or you're going to even serve that sentence.

A. Yes, sir.

Q. You understand all this?

A. Yes, sir.

Q. Now, what I normally do and again even today, I think there was one where we had a pre-sentence report and another one where we did not have a pre-sentence report, but what I would normally do would be to order a pre-sentence report if you were to plead guilty, and that would look into your background and into the background of the offense and using that, I would decide the sentence along with their recommendation. You understand that?

A. Yes, sir.

Q. Now, since you've been arrested on this charge, has anyone mistreated you in any way to get you to plead guilty?

A. No, sir.

Q. No one has beaten you or threatened you or [16] tried to intimidate you in some manner to get you to plead guilty?

A. No, sir.

Q. Has anyone promised you anything to get you to plead guilty?

A. No, sir, no one has promised me anything. I understand that negotiations between the District Attorney and my lawyer have been going on.

Q. Right, so they may make a recommendation—

A. For a recommendation, yes, sir.

Q. For a recommendation?

A. Yes, sir.

Q. But you do understand that is only a recommendation?

A. Yes, sir, I understand that.

Q. All right, are you ready to enter your plea?

A. Yes, sir.

Q. Do you need me to explain anything to you?

A. No, sir, I don't.

Q. Do you need to offer anything more before you enter your plea?

A. No, sir.

Q. Now, your answers have been truthful?

A. Yes, sir.

Q. And this plea that you're about to enter is going to be your own decision?

A. Yes, sir.

Q. And you are ready to enter it?

A. Yes, sir.

Q. If you will step down with your attorney, I'll ask the State to read the indictments.

[17]

INDICTMENT IN CAUSE NUMBER 6011-2 READ TO THE DEFENDANT BY THE DISTRICT ATTORNEY, WHEREUPON THE DEFENDANT ENTERED A PLEA OF GUILTY TO THE CHARGE OF POSSESSION OF MARIJUANA WITH THE INTENT TO DELIVER OR SELL ONE OUNCE OR LESS.

INDICTMENT IN CAUSE NUMBERS 4230-2 AND 4231-2 READ TO THE DEFENDANT BY THE DISTRICT ATTORNEY, WHEREUPON THE DEFENDANT ENTERED A PLEA OF GUILTY IN BOTH CAUSE NUMBERS TO THE CHARGE OF MURDER IN BOTH CAUSE NUMBER.

BY THE COURT: All right, let the record show that the defendant has entered a plea of guilty in Cause Number 6011-2, 4230-2 and 4231-2.

All right, Mr. Garlotte, you can have a seat back on the witness stand.

All right, Mr. Douglass, does the State have a recommendation for sentencing on these three charges?

BY MR. DOUGLASS: The State does, your [18] Honor. It is our recommendation that the defendant receive a three year sentence in Cause Number 6011-2, and in that cause, we're asking the Court to allow us to nolle prosse the charge against Donna Garlotte, but also asking that consecutive to the charge in 6011-2 that the Defendant receive a life sentenec in 4230-2 and a life sentence in 4231-2, but that those two life sentences run concurrent. In effect, what we're asking the Court is for one three year term and two consecutive—consecutive to that three year term, two concurrent life terms.

BY THE COURT: Let me see if I understand it then. He's to receive a life term in both of these cases to run concurrent.

BY MR. DOUGLASS: Right.

BY THE COURT: He would then have a three year sentence on the [19] other charge to run consecutive to those two life sentences. That is correct?

BY MR. DOUGLASS: Either that way, your Honor or allow the three years to run first. In other words, we're just talking about a total of three years and then life or life and then three years.

BY THE COURT: All right, sir. Mr. Holder, is that your understanding of the recommendation?

BY MR. HOLDER: Yes, sir, it's my understanding that the possession case is to run first and then the two life sentences.

QUESTIONS BY THE COURT: (Continuing)

Q. All right, Mr. Garlotte, is that your understanding of the recommendation?

A. Yes, sir.

Q. And that's what was discussed with you?

A. Yes, sir.

Q. So we would run the two life sentences together, and they would run the three year sentence either first or after the life sentence?

[20] A. Yes, sir.

Q. Now, you've had these charges read to you, and you have changed your plea from not guilty to guilty?

A. Yes, sir.

Q. And you're pleading guilty because you are guilty?

A. Yes, sir.

Q. You did commit the offenses as outlined in the indictments?

A. Yes, sir.

Q. Now, you've told me that no one has promised you anything to get you to plead guilty?

A. No, sir.

Q. And no one has mistreated you or coerced you in any way to get you to plead guilty?

A. No, sir.

Q. And you've told me that your plea was going to be your own decision and freely and voluntarily made?

A. Yes, sir.

Q. And that is the case?

A. Yes, sir.

Q. Now, you've told me that you understood what's going on and your past drug problem, that was out of your system at this time?

A. Yes, sir.

Q. So that you do understand what has gone on in the Courtroom?

A. Yes, sir.

Q. You've been in jail now for—

A. Three months.

Q. Three months?

[21] A. A little longer than three months.

BY THE COURT: All right, is there any request for a pre-sentence in this matter?

BY MR. DOUGLASS: Judge, I have no knowledge of any previous convictions or felonies. This man was charged before in Marion County, and it was reduced at that time, and we did a backcheck on him, and I doubt it would make a whole lot of difference. I don't think there's any other convictions, I cannot tell the Court there's absolutely not. I'm not requesting a pre-sentence report.

BY THE COURT: All right, Mr. Holder, is there any necessity for a pre-sentence?

BY MR. HOLDER: No, sir.

QUESTIONS BY THE COURT: (Continuing)

Q. All right, Mr. Garlotte, do you have any other criminal charges in your background anywhere?

A. Just some misdemeanors, a D.U.I, malicious mischief, simple assault, disturbing the peace and [22] possession of marijuana.

Q. But you have no felony convictions?

A. No, sir.

BY THE COURT: All right, has the law enforcement been consulted in this matter?

BY MR. DOUGLASS: Yes, sir. You might ask the Sheriff.

BY THE COURT: All right, Sheriff, have you been consulted concerning this recommendation for sentence?

BY SHERIFF McKENZIE: Yes, sir.

BY THE COURT: Do you have any objection to it or do you think we need a pre-sentence report?

BY SHERIFF McKENZIE: I wouldn't think we do.

BY MR. DOUGLASS: Judge, there is a matter of some property that I talked to the Sheriff about returning to Mr. Garlotte's wife or his mother, one or the other, and the Sheriff has no objection [23] to that. It came out of one of the cases.

BY THE COURT: Has the victim's family been consulted?

BY MR. DOUGLASS: Judge, the only family in the case that I've been able to determine is an estranged wife who—they have been talked to by law enforcement when the case first came about, but it's an unusual situation in that they had charges against the deceased for child molesting at the time the deceased was killed, and I have not had any contact with these people since then. So I assume that they really don't—

BY THE COURT: So we know of no immediate family in the area?

BY SHERIFF McKENZIE: No, sir, the closest one I know of would be Mrs. Reid herself, but really he wasn't her son.

[24] QUESTIONS BY THE COURT: (Continuing)

Q. All right, Mr. Garlotte, do you understand that I will give you one last chance to withdraw your plea?

A. Yes, sir.

Q. Now, do you wish to withdraw your plea?

A. No, sir.

Q. Do you want me to accept your plea?

A. Yes, sir.

Q. And you're telling me that this was freely and voluntarily entered by you?

A. Yes sir.

Q. And you understood about your rights?

A. Yes, sir.

Q. And you understand that by pleading guilty now, you've given up those rights?

A. Yes, sir.

Q. Now, based upon you telling me that, I'm going to find you guilty of possession of marijuana with the intent to deliver or sell one ounce or less in 6011-2 here in Lamar County Circuit Court and find you guilty of murder in Cause Number 4230-2 and 4231-2 in Marion County Circuit Court. You have no objection to that—to those Marion County matters being taken up at this time?

A. No, sir.

Q. Now, based upon what you've told me and also in answer to my questions—and you have told me the truth?

A. Yes, sir.

Q. Based upon that, I'm going to determine that your plea was freely and voluntarily given by you, and that you understood about your rights and what rights you were giving up.

[25] A. Yes, sir.

Q. Now, before I decide on whether to have a presentence report or not and before sentencing, I want to ask you about the incident, particularly the murder incident. First let me ask you about this possession of marijuana. What type of marijuana was it? Was it plants or was it already in bags or—

A. It was just in frisbies. We just smoked some, and then they found a butt that my wife had been saving in the drawer.

Q. And what—where did you obtain this marijuana?

A. I forget where I—it was in Hattiesburg, your Honor.

Q. All right, then on the murder charge, in those particular incidents, tell me about the facts as you recall them.

A. Well, we were—a bunch of us guys had been down at the river drinking and partying, you know, smoking some pot, and we all went up to the store to get some—well, we didn't all go. Greg and Jeff Willoughby and myself went up to the store to get some more beer, and

I called home, and my wife had told me that Ray went up and told the Sheriff that I was suppose to be selling marijuana and I couldn't understand that, why he would go tell the Sheriff that because—I mean, he was suppose to be my friend.

Q. Now, that upset you then?

A. Yeah, I would have done anything for that man, your Honor. I just—I don't know, I got so upset and all, and I wanted to know why, and I got Jeff to take me into town and we picked up Ray and Marie and went by my [26] house and got my gun and took—well, we went back out to the river.

Q. Did you go get the gun first?

A. No, sir, after we picked them up.

Q. Did they—when you picked them up, did they know that you were mad and upset at them?

A. No, sir.

Q. All right, go ahead.

A. And we went back out to the river and got out of the car, and I had my gun in my hand. I asked Ray why he would go do something like that, and he said he didn't, and I asked him again, and he said he didn't, and so I shot by his feet, and he still said he didn't do it, and the next thing I knew, he was laying on the ground and Marie said it's cause you got a D.U.I. and the next thing I knew, we was leaving, and I was down in Gulfport, and then in a couple of days later I came back and turned myself in.

Q. All right, what about Mr. Willoughby, Mr. Jeff Willoughby, he was with you at the time?

A. Yes, sir.

Q. Do you know who went with you or how you got to Gulfport?

A. Jeff Willoughby took me to Gulfport.

Q. Jeff took you to Gulfport?

A. Yes, sir, Greg and Jeff went with me—well, Jeff took me to pick up Ray and Greg was with us.

Q. Now, Marie is his wife, you say?
A. I didn't know they were married or anything.
Q. Just girlfriend or staying together or something?
A. Yes, sir.
[27] Q. So really the only thing you know of is you were upset at him for the information you had gotten about him telling on you?
A. Yes, sir.
Q. That it had enraged you?
A. Yes, sir.
Q. And when you went by and got your gun at the house, you knew that you were going to shoot him then?
A. No, sir.
Q. What was the purpose of getting the gun then?
A. To try and get him to tell me why he did it.
Q. Had you had any drugs at that time?
A. Just marijuana and alcohol.
Q. You had no other type of drugs?
A. No, I don't believe that day, your Honor.

BY THE COURT: All right, does the State see any reason for a pre-sentence?

BY MR. DOUGLASS: The State does not, your Honor, but considering his past problems, did you ask him on the record if he was under the influence of any kind of alcohol or drugs?

BY THE COURT: Yes, sir.

BY MR. DOUGLASS: The State sees know reason, and I have discussed [28] this with law enforcement, and we've talked about this case at length, your Honor.

BY THE COURT: All right, based on what he's said Mr. Sheriff, do you see any reason for a pre-sentence to get any more details into his background, as far as you're concerned?

BY SHERIFF McKENZIE: No, sir.

BY THE COURT: All right, I've heard sufficient details that I will not require a pre-sentence report in this matter.

Mr. Garlotte, if you will step down with your attorney, I'll pass sentence.

DEFENDANT AND HIS ATTORNEY
APPROACHED THE BENCH

BY THE COURT:

Based upon your obvious remorse in this matter, and you experienced here today—indicated here today anyway, and from what I've heard, I see no reason not to go along with the recommendation of the State.

On the charge in 6011-2 of possession of marijuana with the intent to deliver or sell one ounce or less, I will sentence you to a term of three years in the custody of the Mississippi Department of Corrections.

[29] To the charge in 4230-2, to murder in Marion County, I will sentence you to life imprisonment in the custody of the Mississippi Department of Corrections, and that is to run consecutive and after the charge in 6011-2 on the possession of marijuana.

On the charge of murder in 4231-2, I will also sentence you to life in the custody of the Mississippi Department of Corrections, and I will, as recommended by the State, allow that sentence to run concurrent and along with the sentence imposed of life in 4230-2.

I'm going to say that these sentences are to start running as of today. You're remanded back into the custody of the Sheriff to start serving that sentence.

STATE OF MISSISSIPPI

FIFTEENTH CIRCUIT COURT DISTRICT

Jefferson Davis, Lamar, Lawrence,
Marion & Pearl River Counties

April 24, 1986

Mr. Harvey Garlotte
MSP #60710
Unit 29-C
Parchman, Ms. 39738

Dear Mr. Garlotte:

I have received your letter dated April 20, 1986, regarding your plea of guilty in the Marion County Circuit Court. I do not have the authority to allow you to withdraw your plea without going through the proper procedure. This procedure would be the Mississippi Uniform Post Conviction Collateral Relief Act which is the direction you need to take in seeking any relief in this Court. In the petition you file under this act you can present any new evidence, affidavits, etc. that you feel would warrant a hearing on the matter.

I trust this has sufficiently answered your questions.

Sincerely yours,

/s/ Michael R. Eubanks
MICHAEL R. EUBANKS

MRE/aa

BEST AVAILABLE COPY

SENTENCE COMPUTATION DATA SHEET

NAME Harvey Garlotte

NO X60710
Unit 29
Parchman, Ms. 38738

TOTAL TERM OF SENTENCE LIFE & LIFE CC/&3 yrs.CS=LIFE

DATE OF SENTENCE 9-16-1985

JAIL TIME RECORDED 5 & 102 & 1 days

SENTENCE BEGAN 9-11-1985/6-1-1985/5-31-1985

MAXIMUM DISCHARGE DATE LIFE

EARNED TIME RECORD

Class IV 8-22-1988 (00000) Class III 9-1-1988 (8 days per mo.)

Class II (20 days per mo.) Class I (30 days per mo.)

Disciplinary Action On RVR #202-12(9-2-18)

APPLICABLE TO CLASS II AND CLASS III RESIDENTS ONLY

EARNED TIME AS RECORDED THROUGH

Total Amount of Time Accumulated

Current Discharge Date

MERITORIOUS EARNED TIME

Days Credited

Posting Period

Total MET Applied

Maximum amount of time that can be accumulated if continuously confined 481 days.

Between 10-16-1985 and 2-3-1987

EARLIEST POSSIBLE DISCHARGE DATE IF CONTINUOUSLY CONFINED LIFE

Time lost for Disciplinary Action days

Total amount of time lost on this sentence days.

Earned Time Restored days Total Earned Time Restored on sentence days.

THE AMOUNT OF EARNED TIME ACCUMULATED IS CONTINGENT UPON:

1. Class Status
2. Continuous confinement
3. Disciplinary Action (loss of earned time, stoppage and/or class demotion)
4. Conditions applicable to sentence under State Statute, (this applies to certain drug charges, armed robbery and attempted armed robbery offenses.)
5. No earned time can be accumulated if sentenced as an habitual offender.

IMPORTANT:

The above information is based on your present status and is subject to change at any given time. Earned time will be discontinued the date of release and your discharge date will be adjusted to allow you only the amount of time that could be accumulated prior to release.

PAROLE ELIGIBILITY DATES

Minimum Time Required by Statute 5-1-1996 . PRESUMPTIVE PAROLE DATE

SER 999999 . (Parole Board Action)

WR 9999999

Fine, Court Cost, Restitution Outstanding

This must be paid or an acceptable schedule of payment submitted to the Court prior to release on the above date. Failure to comply with the Orders of the Court in this regard could result in service of maximum term of sentence.

Director of Records
Records Department
Mississippi State Penitentiary
Parchman, Mississippi 38738

Date October 19, 1988 nb

SENTENCE COMPUTATION DATA SHEET

NAME GARLOTTE, HARVEY
NO. X60710
SMCI
P. O. BOX 1419
LEAKSVILLE, MS 39451

TOTAL TERM OF SENTENCE LIFE

DATE OF SENTENCE 9-16-1985

JAIL TIME RECORD 5DAYS & 102DAYS & 1DAY

SENTENCE BEGAN 9-11-1985/6-1-1985/5-31-1985

MAXIMUM DISCHARGE DATE LIFE

EARNED TIME ALLOWANCES (50% SENTENCE) 1YR. 6MONTHS

M.E.T. ALLOWANCE 180DAYS
(MET forfeited shall not be restored nor shall it be re-earned by the offender)

EXECUTIVE TIME ALLOWANCE

TIME OUT ON ESCAPE CREDIT ALLOWED FROM (DATE)

TIME OUT ON PAROLE

CREDIT ALLOWED FROM(DATE)

EARNED TIME FORFEITED

MET FORFEITED

EARLIEST PAROLE ELIGIBILITY DATE 12-2-1995

EARLIEST CONDITIONAL DISCHARGE DATE LIFE

EXCLUSIONS:

1. LIFE SENTENCE (X)
2. HABITUAL OFFENDER ( )
3. EARNED TIME ALLOWANCE FORFEITED BY ORDER OF THE COMMISSIONER: ( )
4. SEX OFFENDER(S) DENIED PAROLE BASED ON PSYCHOLOGICAL/PSYCHIATRIC EXAMINATION: ( )
5. MANDATORY ARMED ROBBERY SENTENCE ( )

CONDITIONS:

TIME COMPUTATION OF CONSECUTIVE SENTENCE IS BASED ON EACH INDIVIDUAL SENTENCES.

NO INMATE IN ANY EVENT SHALL HAVE HIS SENTENCE TERMINATED BY ADMINISTRATIVE EARNED TIME ACTION UNTIL HE IS ELIGIBLE FOR PAROLE.

11-13-1992PS
DATE

(MS.) CHRISTINE HOUSTON
CHIEF RECORDS OFFICER

BEST AVAILABLE COPY

PS

SENTENCE COMPUTATION RECORD

NUMBER X60710

NAME GARLOTTE, HARVEY COUNTY MARION/LAMAR

DATE OF ARREST

DATE RELEASED ON BOND

TERM OF SENTENCE:

LIFE & LIFE CC &

3YRS. CS

NUMBER OF DAYS JAIL TIME ALLOWED 5DAYS & 102DAYS & 1DAY

DATE RECEIVED 10-1-1985

DATE OF SENTENCE 9-16-1985

SENTENCE BEGIN 9-11-1985/6-1-1985/5-31-1985

TOTAL SENTENCE

LIFE

MAXIMUM DISCHARGE DATE LIFE

Minimum Discharge Date on 1 year sentences (NOT TO BE DISCHARGED PRIOR TO 11 MOS. CONFINEMENT.)

DATE	CLASS	CREDITS ALLOWED	CREDITS FORFEITED	CREDITS RESTORED	SER DATE	EARLIEST WORK-RELEASE DATE	EARLIEST PAROLE DATE	DISCHARGE DATE
9-16-1985		50% OF	THREE(3 YR)	SENTENCE	SENATE BILL #2030		9-11-1986	3-11-1987
7-1-1986		ADDITIONAL 102DAYS JAIL TIME FROM					6-1-1986	11-29-1986
9-4-1986		6-6-1985 TO 12-1 -1984 ADDITIONAL 1DAY JAILTIME ALLOWED FROM					5-31-1986	11-28-1986
11-13-1992		12-10-1984 TO 12-11-1934 180DAYS MERITORIOUS EARNED TIME					12-2-1985	6-1-1986
9-16-1985		ADDITIONAL LIFE & LIFE CC SENTENCE					12-2-1995	LIFE

BEST AVAILABLE COPY

SUPREME COURT OF THE UNITED STATES

No. 94-6790

HARVEY F. GARLOTTE,
Petitioner

v.

KIRK FORDICE,
Governor of Mississippi

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 1, 1995. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 29, 1995. Rule 29.2 does not apply.

January 20, 1995

Supreme Court, U.S.
FILED
MAR 1 1995
OFFICE OF THE CLERK

No. 94-6790

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HARVEY F. GARLOTTE,
Petitioner,

v.

KIRK FORDICE,
Governor of Mississippi,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE PETITIONER

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March 1, 1995

QUESTION PRESENTED

Whether a prisoner serving a series of consecutive sentences remains "in custody" for purposes of 28 U.S.C. § 2241(c)(3) throughout the aggregate duration of those sentences, and, if so, whether the court below erred in holding that it lacked jurisdiction to hear petitioner's challenge to the first of two consecutive sentences.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. FOR PURPOSES OF 28 U.S.C. § 2241(c)(3), A PRISONER SERVING CONSECUTIVE PRISON TERMS ON SEPARATE COUNTS OF CONVICTION IS "IN CUSTODY" THROUGHOUT THE AGGREGATE DURATION OF THOSE TERMS	8
A. Consecutive Sentences Must Be Aggregated For Purposes Of Applying § 2241(c)(3)'s "In Custody" Requirement	8
B. Mississippi Law Confirms That Garlotte Is Presently "In Custody" Under Each Of The Consecutive Sentences Imposed On Him	15
II. *MALENG v. COOK* FORECLOSES JURISDICTION ONLY OVER CONVICTIONS THAT NO LONGER IMPOSE ANY PRESENT RESTRAINTS UPON THE HABEAS PETITIONER	19

TABLE OF CONTENTS—Continued

Page

III. RECOGNITION OF HABEAS JURISDICTION OVER THE EARLIER OF GARLOTTE'S CONSECUTIVE SENTENCES IS CONSISTENT WITH THE REMEDIAL PURPOSES OF THE WRIT 23

CONCLUSION 27

APPENDIX A

TEXT OF STATUTORY PROVISIONS 1a

TABLE OF AUTHORITIES

CASES — Page

Allen v. Dowd, 964 F.2d 745 (8th Cir.), *cert. denied*, 113 S. Ct. 335 (1992) 8
Armstrong v. State, 618 So. 2d 88 (Miss. 1993) 19
Bernard v. Garraghty, 934 F.2d 52 (4th Cir. 1991) 7, 22
Blitz v. United States, 153 U.S. 308 (1894) 10, 13
Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973) 24
Brown v. Commissioner of Corrections, 147 N.E.2d 782 (Mass. 1958) 10
Burrell v. State, 613 So. 2d 1186 (Miss. 1993) 18
Cappetta v. Wainwright, 406 F.2d 1238 (1969), *overruled, Garlotte v. Fordice*, 29 F.3d 216 (5th Cir. 1994) 14
Carafas v. LaVallee, 391 U.S. 234 (1968) 23, 24, 25, 26
Commonwealth ex rel. Alexander v. Rundle, 214 A.2d 304 (Pa. Super. 1965) 15
Estelle v. Dorrough, 420 U.S. 534 (1975) 24
Fawcett v. Bablitch, 962 F.2d 617 (7th Cir. 1992) 7, 10, 13
Fox v. Kelso, 911 F.2d 563 (11th Cir. 1990) 7
Garlotte v. Fordice, 29 F.3d 216 (5th Cir. 1994) 1, 4, 5, 12, 19
Garlotte v. State, 530 So. 2d 693 (Miss. 1988) 3
Goodwin v. Page, 418 F.2d 867 (10th Cir. 1969) 10
Green v. State, 245 A.2d 147 (Me. 1968) 10
Harrison v. Indiana, 597 F.2d 115 (7th Cir. 1979) 14, 26
Hensley v. Municipal Court, 411 U.S. 345 (1973) 23, 24
Hoffman v. United States, 244 F.2d 378 (9th Cir. 1957) 10
In the Interest of W.B., 428 So. 2d 309 (Fla. Dist. Ct. App. 1983) 14
James v. Ward, 59 Ky. (2 Met.) 271 (1859) 11
Johnson v. Henderson, 455 F.2d 983 (5th Cir. 1972) 10
Johnson v. O'Dea, No. 92-6063, 1994 U.S. App. LEXIS 3160 (6th Cir. Feb. 18, 1994) (unpublished) 7
Jones v. Cunningham, 371 U.S. 236 (1963) 7, 24
Luckett v. State, 582 So. 2d 428 (Miss. 1991) 18

TABLE OF AUTHORITIES—Continued

Page

Lyons v. Brierly, 435 F.2d 1214 (3d Cir. 1970) 14
McCoy v. Wainwright, 804 F.2d 1196 (11th Cir. 1986) 14
McNally v. Hill, 293 U.S. 131 (1934), *overruled, Peyton v. Rowe*, 391 U.S. 54 (1968) 14
Maleng v. Cook, 490 U.S. 488 (1989) ..... *passim*
Meadows v. Blackwell, 433 F.2d 1298 (5th Cir. 1970) 10
Meeks v. State, 604 So. 2d 748 (Miss. 1992) 18
Neely v. United States, 2 F.2d 849 (4th Cir. 1924) .. 11
Nelson v. George, 399 U.S. 224 (1970) 24
Parker v. Ellis, 362 U.S. 574 (1960), *overruled, Carafas v. LaVallee*, 391 U.S. 234 (1968) 25
Parris v. State, 208 S.E.2d 493 (Ga. 1974) 14
Peyton v. Rowe, 391 U.S. 54 (1968) ..... *passim*
Post v. Ruth, 354 So. 2d 1111 (Miss. 1978) 16
Potter v. State, 139 S.E.2d 4 (N.C. 1964) 10
Rex v. Wilkes, 19 How. St. Tr. 1075 (K.B. 1770) .. 11
Rummel v. Estelle, 445 U.S. 263 (1980) 14
Russell v. United States, 306 F.2d 402 (9th Cir. 1962) 14
Schlup v. Delo, 115 S. Ct. 851 (1995) 23
Sibron v. New York, 392 U.S. 40 (1968) 26
Solem v. Helm, 463 U.S. 277 (1983) 13
Thacker v. Peyton, 419 F.2d 1377 (4th Cir. 1969) .. 14
Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966) 14
United States v. Bustillos, 31 F.3d 931 (10th Cir. 1994) 8
United States v. Remus, 12 F.2d 239 (6th Cir.), *cert. denied*, 271 U.S. 689 (1926) 11
United States v. Tucker, 404 U.S. 443 (1972) 21
United States ex rel. Di Rienzo v. State, 423 F.2d 224 (3d Cir. 1970) 26
Vandegrift v. State, 171 A.2d 713 (Md. 1961) 12
Warden v. Marrero, 417 U.S. 653 (1974) 11, 14
Williams v. Puckett, 624 So. 2d 496 (Miss. 1993) .. 16

STATUTES

28 U.S.C. § 1254(1) (1993) 2
28 U.S.C. § 2241(c)(3) (1994) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

28 U.S.C. § 2254 (1994) 3
Miss. Code Ann. § 47-5-138 (1993) 15
Miss. Code Ann. § 47-5-139 (1993) 15, 19
Miss. Code Ann. § 47-5-142 (1993) 17, 19
Miss. Code Ann. § 47-7-3(1) (1993) 16, 17

OTHER AUTHORITIES

Opinion Letter from Mike Moore to Commissioner, State Dept. of Corrections, 1993 WL 294305 (Miss. A.G. July 21, 1993) 16
Opinion Letter from Bill Allain to General Counsel, State Dept. of Corrections, 1982 WL 44423 (Miss. A.G. May 3, 1982) 21
Developments in the Law—Federal Habeas Corpus, 83 HARV. L. REV. 1038 (1970) 12
William S. Church, A TREATISE ON THE WRIT OF HABEAS CORPUS § 376 (1893) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-6790

HARVEY F. GARLOTTE,
Petitioner,

v.

KIRK FORDICE,
Governor of Mississippi,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 29 F.3d 216 (5th Cir. 1994). (Joint Appendix ("JA") at 25.) The opinion of the district court, issued June 3, 1992, is not reported. (JA at 18.)

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit were entered on August 19, 1994. The Petition for Writ of Certiorari was filed pro se on November 7, 1994, with accompanying motion for leave to proceed in forma pauperis. The petition and the motion to proceed in forma pauperis were granted

on January 20, 1995. On further motion of Petitioner, counsel was appointed on January 23, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1993).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. § 2241(c) (3); 28 U.S.C. § 2254; Miss. Code Ann. § 47-5-138; Miss. Code Ann. § 47-5-139; Miss. Code Ann. § 47-5-142; and Miss. Code Ann. § 47-7-3(1), are reproduced in Appendix A hereto.

STATEMENT OF THE CASE

On September 16, 1985, before Judge Eubanks of the Circuit Court of Lamar County, Mississippi, Petitioner Harvey F. Garlotte entered simultaneous guilty pleas to one count of possession of marijuana with intent to deliver and two counts of murder. These pleas were entered pursuant to an agreement with the State to reach a global resolution of all outstanding criminal charges against Garlotte.[1]

Under the plea agreement, the State of Mississippi recommended that Garlotte be sentenced to a consecutive term of three years on the marijuana count and to two concurrent life sentences on the murder counts. (JA at 43.) Apparently recognizing that Garlotte's actual time in prison would be based upon the entire duration of his consecutive sentences, the District Attorney openly expressed indifference concerning Judge Eubanks' tentative suggestion that Garlotte's life sentences be served prior to the three-year marijuana sentence: "Either that way, your Honor or allow the three years to run first. In other words, we're just talking about a total of three years and then life or life and then three years." (JA at 43.)

---

[1] In his habeas petition, Garlotte alleges that the terms of his negotiated plea agreement were misrepresented to him. (JA at 6.)

The trial court ultimately directed that Garlotte's concurrent life sentences run "consecutive, and after" the three-year marijuana sentence. (JA at 50.)

On April 20, 1986, Garlotte sent a letter to the trial court requesting that his guilty plea on the marijuana count be vacated. (JA at 51.) The court responded to this request with a letter advising Garlotte of the proper procedures for seeking post-conviction relief. (JA at 51.) On September 25, 1986, Garlotte submitted a motion to the Clerk of the Circuit Court of Lamar County, Mississippi, seeking to have his marijuana conviction vacated. A denial was filed on November 3, 1986. Garlotte then filed a timely appeal to the Mississippi Supreme Court. Nearly two years later, on August 10, 1988, the court rejected petitioner's appeal without a hearing. *See Garlotte v. State*, 530 So. 2d 693 (Miss. 1988).[2] Further post-conviction motions filed by Garlotte were denied by the Mississippi Supreme Court on January 18, 1989.

On October 6, 1989, Garlotte filed a petition for a writ of habeas corpus with the United States District Court for the Southern District of Mississippi, Hattiesburg Division. After an initial skirmish over whether Garlotte had properly exhausted his state remedies as required by 28 U.S.C. § 2254(b), a federal magistrate judge recommended that the petition be denied on the merits. (JA at 5.) The magistrate took this action without holding a hearing, and without even requesting Respondent to make a submission on the merits of Garlotte's petition. Over Garlotte's objection, the district court adopted the magistrate's recommendation and, on June 3, 1992, issued an order and judgment dismissing the petition. (JA at 18, 19.)

Shortly thereafter, the Court of Appeals for the Fifth Circuit granted Garlotte's request for a certificate of prob-

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[2] The Mississippi Supreme Court denied rehearing on September 28, 1988.

able cause to appeal,[3] observing that "Rule 4 of the Rules Governing Section 2254 Cases permits [a] district court to dismiss [a] petition without requiring the state to respond only if the claims are frivolous, or it appears from the face of the petition that the petitioner is not entitled to relief." (JA at 23.) In the court of appeals, Respondent argued for the first time that under this Court's decision in *Maleng v. Cook*, 490 U.S. 488 (1989), the court lacked jurisdiction over Garlotte's petition because Garlotte's "custody" under the marijuana conviction had assertedly ended.[4] Garlotte countered that his sentence for the marijuana conviction was imposed consecutively with respect to his life sentences for murder, and that it continued to postpone the date on which he would be initially eligible for release on parole. Accordingly, Garlotte urged that he was "in custody" for jurisdictional purposes under this Court's decision in *Peyton v. Rowe*, 391 U.S. 54 (1968).

The Fifth Circuit adopted Respondent's view of *Maleng*, and dismissed Garlotte's petition without addressing the merits of his constitutional claims. *See Garlotte v. Fordice*, 29 F.3d 216 (5th Cir. 1994). (JA at 25.) The court began by artificially segregating Garlotte's three-year marijuana prison term from the sentences imposed on the remaining counts, over Garlotte's objection that Mississippi law treats his consecutive prison terms as an aggregate term for all relevant purposes. On the basis of this segregation, the court declined to follow *Peyton*'s holding that "a petitioner who [is] serving consecutive sentences imposed by the state court is 'in custody' under any one of those sentences," *id.* at 218 (citing *Peyton*, 391 U.S. at 67), noting that "the petitioners in *Peyton* were chal-

---

[3] The district court had earlier rejected Garlotte's request for a certificate of probable cause. *See Garlotte*, 29 F.3d at 217.

[4] "The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) (1994).

lenging a sentence they had not yet begun to serve," *id.* It termed the delay in Garlotte's initial parole eligibility caused by the challenged marijuana conviction a mere "collateral consequence" of what it described as a "fully expired" conviction. *Id.* at 218 (quoting *Maleng*, 490 U.S. at 91). The court of appeals thus dismissed the petition for lack of subject matter jurisdiction.

SUMMARY OF ARGUMENT

Because the sentence Garlotte challenges in his habeas petition was imposed consecutively with respect to other sentences, and because he remains confined by the State of Mississippi under the aggregate term of those sentences, Garlotte's petition satisfies the jurisdictional prerequisite under 28 U.S.C. § 2241(c)(3) that he be "in custody" under the challenged conviction. The Fifth Circuit misapplied two of this Court's decisions—*Peyton v. Rowe*, 391 U.S. 54 (1968) and *Maleng v. Cook*, 490 U.S. 488 (1989)—in reaching the contrary conclusion.

In *Peyton*, this Court held that a prisoner serving consecutive sentences is " 'in custody' under any one of them for purposes of § 2241(c)(3)." 391 U.S. at 67 (footnote omitted). Although that case involved a habeas challenge to a consecutive sentence that the petitioner had not yet begun to serve, the rationale advanced in *Peyton* was not limited to challenges to future consecutive sentences. Rather, *Peyton* was grounded in the notion that consecutive sentences are so interwoven that, for all practical purposes, they direct a unitary period of confinement. Where sentences are imposed consecutively, the duration and continuing validity of the earlier sentences determine the timing under which any later sentences are served. And where, as here, consecutive prison terms have been imposed simultaneously by the same court, the inference is especially strong that the prisoner has received a unitary sentence.

The Mississippi penal code amply confirms that Garlotte's consecutive sentences effectively command a single

term of confinement. For such penological purposes as commutation and parole eligibility, the order of each of Garlotte's discrete consecutive sentences makes no difference under Mississippi law. It is thus not surprising that the District Attorney expressed indifference at Garlotte's sentencing as to the sequence in which Garlotte would be required to serve his consecutive sentences. The unitary treatment of Garlotte's consecutive sentences under Mississippi law also explains how the Mississippi Department of Corrections, in two separate actions following the date on which Garlotte assertedly "discharged" his marijuana sentence, could have made adjustments to that sentence. In view of the treatment Mississippi law accords Garlotte's consecutive sentences for penological purposes, it would be profoundly unfair to make Garlotte's right to avail himself of the writ of habeas corpus turn on the fortuity of the order in which he was required to serve those sentences in the judgment and commitment order.

Maleng does not require, or even suggest, a contrary result. *Maleng* holds simply that a habeas petitioner is not rendered "in custody" under a totally independent and already discharged conviction simply because that conviction has been used collaterally to enhance the length of a sentence imposed for a subsequent crime. 490 U.S. at 492-93. It has no application in the context of consecutive sentences imposed by the same jurisdiction, where each such sentence directly imposes present restraints on the prisoner's freedom throughout the prisoner's aggregate term of confinement. Unlike the petitioner in *Maleng*, Garlotte does not challenge the marijuana conviction's "enhancement" of his life sentences, but rather seeks to arrest that conviction's postponement of his possible release by delaying the life sentences' asserted commencement date. Because *Maleng* forecloses habeas jurisdiction only with respect to "fully expired" sentences whose continuing custodial significance is limited to their consideration as a basis for enhancing sentences for subsequent crimes, *see Maleng*, 490 U.S. at 492, Garlotte

remains "in custody" under the authority of his marijuana conviction for purposes of § 2241(c)(3).

ARGUMENT

Pursuant to 28 U.S.C. § 2241(c)(3), the federal courts have jurisdiction to issue writs of habeas corpus on behalf of prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) (1994). Consistent with the text of this provision, the habeas petitioner's custodial status has long been interpreted to be a threshold jurisdictional requirement. Nevertheless, as this Court has noted, "[w]hile limiting [the writ's] availability to those 'in custody,' the statute does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." *Jones v. Cunningham*, 371 U.S. 236, 238 (1963).

This Court has "interpreted [§ 2241(c)(3)] as requiring that the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed." *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) (citation omitted). In concluding that Garlotte was not so confined, the court of appeals both misapprehended the nature and operation of Garlotte's consecutive sentences and misapplied *Maleng*. Because Garlotte's current custodial status is directly determined by each of the consecutive sentences imposed on him, he must be considered to be "in custody" under each of those sentences for as long as he remains confined. *See Peyton v. Rowe*, 391 U.S. 54, 67 (1968). This inherent quality of consecutive prison terms renders *Maleng* wholly inapplicable to cases like Garlotte's, a fact recognized by several courts of appeals. *See Fawcett v. Bablitch*, 962 F.2d 617 (7th Cir. 1992); *Bernard v. Garraghty*, 934 F.2d 52 (4th Cir. 1991); *Fox v. Kelso*, 911 F.2d 563 (11th Cir. 1990); *but see Johnson v. O'Dea*, No. 92-6063, 1994 U.S. App. LEXIS 3160 (6th Cir. Feb. 18, 1994) (unpublished) (jurisdiction unavailable to attack first of two

consecutive sentences); *Allen v. Dowd*, 964 F.2d 745 (8th Cir.) (*Maleng* held to preclude jurisdiction), *cert. denied*, 113 S. Ct. 335 (1992). *But cf. United States v. Bustillos*, 31 F.3d 931 (10th Cir. 1994) (jurisdiction unavailable to attack first of two consecutive sentences in § 2255 proceeding).

I. FOR PURPOSES OF 28 U.S.C. § 2241(c)(3), A PRISONER SERVING CONSECUTIVE PRISON TERMS ON SEPARATE COUNTS OF CONVICTION IS "IN CUSTODY" THROUGHOUT THE AGGREGATE DURATION OF THOSE TERMS.

In *Peyton*, this Court held that a prisoner serving consecutive sentences is " 'in custody' under any one of them for purposes of § 2241(c)(3)." 391 U.S. at 67 (footnote omitted). This holding rests on the principle that consecutive sentences imposed by the same jurisdiction effectively command a single period of confinement. This principle applies whether, as in *Peyton*, the petitioner technically has yet to begin serving the prison terms imposed on the challenged counts of conviction or, as here, the petitioner has technically served the prison term imposed on the challenged count but has not yet completed his scheduled confinement. The Fifth Circuit erred by failing to give full recognition to this longstanding principle, and in finding that principle insufficient to sustain jurisdiction over Garlotte's habeas petition.

A. Consecutive Sentences Must Be Aggregated For Purposes Of Applying § 2241(c)(3)'s "In Custody" Requirement.

Consecutive sentences of imprisonment are, for all practical purposes, unitary. Under the controlling decisions of this Court, a challenge to any of the convictions underlying consecutive sentences satisfies the "in custody" requirement of 28 U.S.C. § 2241(c)(3) as long as the petition is brought during the prisoner's aggregate term of confinement.

This principle was first endorsed in the Court's landmark decision in *Peyton*. There, the Court stated flatly that a prisoner serving consecutive sentences is " 'in custody' under any [of those sentences] for purposes of § 2241(c)(3)." 391 U.S. at 67 (footnote omitted). Ruling that the writ was available to test the constitutionality even of a sentence that the petitioner had not technically begun serving, the Court reasoned:

> [I]n common understanding "custody" comprehends respondents' status for the entire duration of their imprisonment. Practically speaking, [respondent] Rowe is in custody for 50 years, or for the aggregate of his 30- and 20-year sentences. For purposes of parole eligibility, under Virginia law he is incarcerated for 50 years. . . . Nothing on the face of § 2241 militates against an interpretation which views [respondents] as being "in custody" under the aggregate of the consecutive sentences imposed on them.

Id. at 64 (citations omitted). Under the principle of *Peyton*, § 2241(c)(3)'s jurisdictional grant thus extends to "any one" of a prisoner's consecutive sentences that, together, order a continuous period of confinement. *See id.* at 67.

As suggested by the *Peyton* Court, *see id.* at 64, it would be inconsistent with the practical realities of criminal sentencing to forge an artificial separation of consecutive terms for purposes of applying the "in custody" requirement. To the prisoner on whom consecutive sentences have been imposed, the duration of each discrete sentence in the consecutive sequence is immaterial. For such a prisoner, only the aggregate period he or she has been ordered to spend behind bars holds any practical relevance. Likewise, where consecutive sentences are imposed by a single jurisdiction, the order in which the prisoner has been directed to fulfill those sentences is of no significance, as conditions of confinement ordinarily do not change as a consecutive prison term on one count is technically completed and another begun.

In a fundamental sense, consecutive sentences are unitary, as the duration and continuing validity of the earlier sentences determine the timing under which any later sentences are served. *See, e.g., Blitz v. United States*, 153 U.S. 308, 318 (1894) (where first of two consecutive sentences is vacated, second sentence held to commence on date of imposition, rather than on date of vacatur).[5] As Judge Easterbrook noted in the Seventh Circuit's recent decision on this issue, the commencement dates of subsequent sentences imposed consecutively are not fixed, but rather are keyed to the status of prior sentences in the sequence. *See, e.g., Fawcett*, 962 F.2d at 618 ("a consecutive sentence uses the first conviction to postpone release on the second"); *see also Fox*, 911 F.2d at 567-68 ("The misdemeanor sentences that Fox served delayed the date from which he will receive credit for time served against the felony convictions under which he is currently incarcerated."). Each sentence imposed consecutively remains equally determinative of the only important event for the prisoner (and for the De-

[5] The rule pronounced in *Blitz*—that where the first of two consecutive sentences is vacated, the second sentence is considered to have commenced as of the date it was imposed (with the prisoner receiving credit for any time served after that date)—is widely observed in federal and state courts. *See Johnson v. Henderson*, 455 F.2d 983, 984 (5th Cir. 1972) (where first consecutive sentence was vacated in habeas proceeding, second sentence held to begin at date of imposition); *Goodwin v. Page*, 418 F.2d 867, 868 (10th Cir. 1969) (same); *Hoffman v. United States*, 244 F.2d 378, 380 (9th Cir. 1957) (same); *Brown v. Commissioner of Corrections*, 147 N.E.2d 782, 784-85 (Mass. 1958) (same); *Green v. State*, 245 A.2d 147, 149-50 (Me. 1968) (same); *Potter v. State*, 139 S.E.2d 4, 5 (N.C. 1964) (same); *see also Meadows v. Blackwell*, 433 F.2d 1298, 1299 (5th Cir. 1970) (habeas petitioner entitled to credit for "time served on an invalid sentence at a time when a presently existing sentence could have been served"). In fact, Garlotte has located no case, federal or state, which has denied a prisoner such credit where, as here, the consecutive sentences were imposed by the same jurisdiction simultaneously. At least one federal court has suggested that the Constitution may require a state to credit time served under a vacated sentence in this manner. *See Goodwin*, 418 F.2d at 868.

partment of Corrections)—the date of his release from confinement.

The singularity of consecutive sentences is particularly pronounced where, as here, those sentences have been imposed simultaneously by a single court in a consolidated proceeding. To be sure, even when consecutive sentences are imposed in separate proceedings, a state's election to proceed with consecutive rather than concurrent terms of imprisonment reflects its intention to make the timing of the later terms dependent upon completion of the former.[6] But where consecutive sentences have been imposed simultaneously by the same court, the inference that the prisoner has been given a "package deal" for his offenses—in effect, an aggregate period of incarceration—is all the more clear. *Cf. Warden v. Marrero*, 417 U.S. 653, 658 (1974) ("it [cannot] be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole").[7] An aggregate term of imprisonment was

[6] At common law, multiple criminal sentences were presumed to run concurrently unless otherwise specifically stated. *See* WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 376, at 534-35 (1893); *see, e.g., United States v. Remus*, 12 F.2d 239, 239-40 (6th Cir.), *cert. denied*, 271 U.S. 689 (1926); *see also James v. Ward*, 59 Ky. (2 Met.) 271, 274-75 (1859) (courts are without power to impose consecutive sentences absent statutory grant of authority).

[7] Indeed, the practice of imposing consecutive sentences for multiple criminal offenses developed largely as a more administrable and precise alternative to the use of concurrent or general sentences. The earliest British case to discuss the purposes of consecutive sentencing, *Rex v. Wilkes*, 19 How. St. Tr. 1075, 1132-35 (K.B. 1770), describes the practice as offering significant advantages over the imposition of a single term, and over the imposition of concurrent sentences of different length, in the event one of the convictions is thereafter disturbed; in such circumstances, the opinion explains, the contribution of the remaining valid conviction to the overall term of confinement can readily be determined. *See id.* at 1133-34. In this country as well, the use of consecutive sentences (over general sentences) has been encouraged in order to facilitate adjustment of prisoners' confinement in circumstances

certainly what Garlotte bargained for when he entered into plea negotiations with respect to all of the Mississippi criminal charges pending against him in 1985, and the sentencing judge certainly treated the plea arrangement as such.

In spite of these considerations, the Fifth Circuit artificially segregated Garlotte's consecutive terms of confinement based upon the fortuity of the order in which the terms appeared in the trial court's judgment and commitment order. In the process, the court restrictively construed *Peyton* to apply only in circumstances where the sentence under review has not yet technically commenced. *Garlotte*, 29 F.3d at 218. This construction of § 2241 (c)(3) elevates form over substance. It ignores the practical reality—recognized in *Peyton*—that when consecutive sentences are imposed, the prisoner remains "in custody" throughout the aggregate duration of his or her confinement.

More fundamentally, the reasoning of the court below is inconsistent with the logic of *Peyton*. Inasmuch as the habeas petitioners in *Peyton* were not yet technically serving the sentences they sought to challenge, they were not presently subject to any discrete restraints from the underlying convictions.[8] Rather, they were "in custody" for

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where one or more of the underlying convictions is invalidated. *See, e.g., Neely v. United States*, 2 F.2d 849, 853 (4th Cir. 1924) ("[T]he better practice is for the trial court . . . to apply the punishment it awards to the separate counts upon which the prisoners have been convicted . . . , [as] a much simpler problem will be presented to the appellate court, in the event that . . . error has been committed as to the issue raised by some, but not by all, of the counts."); *Vandegrift v. State*, 171 A.2d 713, 715 (Md. 1961) (same).

[8] Notably, one of the *Peyton* Court's justifications for its jurisdictional holding—the concern that, absent a rule of aggregation, a prisoner who is ultimately successful would have to suffer unconstitutional confinement under the challenged conviction for some period of time while the petition is addressed, *see Peyton*, 391 U.S. at 64—implicitly recognizes that a prisoner challenging a "future" consecutive sentence is not subject to any present restraints by

purposes of § 2241(c)(3) only in the sense that the challenged convictions determined the overall length of their period of continuous confinement. As this Court has tacitly recognized, *see Blitz*, 153 U.S. at 318, the same is true of a consecutive sentence which has technically been served. Whereas an "unserved" consecutive sentence encumbers the prisoner's future liberty, a completed consecutive sentence represents a continuing claim on the petitioner's freedom by postponing the date from which any subsequent sentences run. *See, e.g., Fawcett*, 962 F.2d at 618.[9] The effects of each of a series of consecutive sentences on the timing of a prisoner's release from confinement simply cannot be separated.[10]

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virtue of that sentence alone. *See Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1090-91 (1970).

[9] True, the Court in *Peyton* believed it important to permit challenges to "unserved" consecutive sentences in part to ensure that "[m]eaningful factual hearings on alleged constitutional deprivations [could] be conducted before memories and records grow stale." 391 U.S. at 65. But that policy rationale was not cited (nor could it have been cited) as a basis for extinguishing the statutory "in custody" requirement in such circumstances, but rather was cited only as an additional ground for treating consecutive sentences as unitary for habeas purposes. Clearly, the relevance of *Peyton's* jurisdictional rule for aggregating consecutive sentences should not depend upon the applicability of such an untethered policy rationale.

[10] The connection between earlier and later consecutive sentences is no less direct where one of the sentences carries a life term, in that a successful challenge to a prior fixed term will advance the life sentence's commencement date. Such an advancement can bring significant advantages to the prisoner. For instance, because Garlotte's life sentences include the possibility of parole, a successful challenge to his three-year marijuana term will hasten the date on which he is first eligible for release from confinement. *See infra* note 14; *compare Peyton*, 391 U.S. at 56 n.3 (noting that successful challenge to consecutive sentence not yet served would have the effect of advancing prisoner's parole eligibility date under the remaining sentences). In this regard, it bears noting that the availability and timing of parole have long been understood to be material to an assessment of the quantum of punishment visited upon an offender. *See Solem v. Helm*, 463 U.S. 277, 303 (1983) (life sentence without

Because Garlotte's single three-year term and his two life terms were imposed consecutively by the State of Mississippi, and because each such term remains instrumental in determining the date on which his continuous period of confinement may end, *Peyton* instructs that Garlotte is "in custody" under each of those sentences for the duration of his imprisonment.[11]

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possibility of parole for three nonviolent felonies held to violate Eighth Amendment's proportionality principle); *Rummel v. Estelle*, 445 U.S. 263, 266-67, 280-81 (1980) (life sentence with possibility of parole for nonviolent recidivist held not to violate Eighth Amendment); *see also Warden v. Marrero*, 417 U.S. at 663 ("a repealer of parole eligibility previously available to imprisoned offenders would present [a] serious question under the *ex post facto* clause").

[11] Prior to *Maleng*, this was the uniform view among the courts of appeals. *See, e.g., McCoy v. Wainwright*, 804 F.2d 1196 (11th Cir. 1986); *Harrison v. Indiana*, 597 F.2d 115 (7th Cir. 1979); *Lyons v. Brierly*, 435 F.2d 1214 (3d Cir. 1970); *Thacker v. Peyton*, 419 F.2d 1377 (4th Cir. 1969); *Cappetta v. Wainwright*, 406 F.2d 1238 (1969), *overruled, Garlotte v. Fordice*, 29 F.3d 216 (5th Cir. 1994). Indeed, even before *Peyton* issued, when the rule of *McNally v. Hill*, 293 U.S. 131 (1934), prevented prisoners from challenging consecutive sentences they were scheduled to serve in the future, federal courts permitted challenges to consecutive sentences under 28 U.S.C. § 2241(c)(3) that had already technically been served. *See, e.g., Tucker v. Peyton*, 357 F.2d 115, 117-18 (4th Cir. 1966); *see also Russell v. United States*, 306 F.2d 402, 405 (9th Cir. 1962) (motion under 28 U.S.C. § 2255).

Notably, most state courts which aggregate consecutive sentences in the context of state collateral review proceedings permit prisoners serving consecutive sentences to challenge a prior conviction even if the prisoner has technically completed the sentence for the conviction at issue. *See In the Interest of W.B.*, 428 So. 2d 309, 312 (Fla. Dist. Ct. App. 1983) (noting with approval that " 'there are circumstances in which a prisoner may use habeas corpus to attack the validity of some earlier sentence that he has already served' " (quoting 17 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4262 (1978))); *Parris v. State*, 208 S.E.2d 493, 496 (Ga. 1974) ("The mere fact that the [consecutive] state sentence has been completely served should no longer be a bar to attacking it through habeas corpus even though the petition is not initially filed until after the sentence is

B. Mississippi Law Confirms That Garlotte Is Presently "In Custody" Under Each Of The Consecutive Sentences Imposed On Him.

In *Peyton*, the Court reached the conclusion that "a prisoner serving consecutive sentences is 'in custody' under any one of them" not only in light of the unitary quality of consecutive sentences, but also because the relevant state law treated such sentences as a single aggregate sentence for penological purposes. *Peyton*, 391 U.S. at 67; *see id.* at 64. Here, as in *Peyton*, the State's penal code treats consecutive sentences as a unitary term of confinement. While the question whether a prisoner is "in custody" under § 2241(c)(3) is federal in nature, this state-law treatment provides additional compelling support for the conclusion that Garlotte is currently confined in part under the direct authority of his marijuana conviction.

When consecutive sentences are imposed in Mississippi, the prisoner's release date and other penological consequences turn on the prisoner's aggregate scheduled confinement, not on the duration of each sentence individually or on the order in which the prisoner was required to serve them. To wit, the Mississippi Code specifically provides that "[a]n offender under two . . . or more consecutive sentences shall be allowed commutation based upon *the total term* of the sentences." [12] Miss. Code Ann.

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completed."); *cf. Commonwealth ex rel. Alexander v. Rundle*, 214 A.2d 304, 305 (Pa. Super. 1965) (allowing an inmate to attack "the first sentence on which he is on 'constructive' parole, while serving the second or later sentence" (footnote omitted)).

[12] The term "commutation" refers to reductions in the length of a prisoner's confinement based on the application of earned time credits. *See* Miss. Code Ann. §§ 47-5-138, 47-5-139 (1993). Because earned time credits can be forfeited under Mississippi law, *see id.* § 47-5-138(2) ("An inmate may forfeit all or part of his earned time allowance for a serious violation of rules"), the fact that such credits are determined on the basis of "the total term of [any consecutive] sentences"—rather than individually with

§ 47-5-139(2) (1993) (emphasis added). The parole eligibility of a prisoner confined under consecutive sentences is determined in similar fashion, and is generally a function of the total duration of the prisoner's scheduled confinement. Thus, the Code provides that "[e]very prisoner . . . who has served not less than one-fourth (¼) of *the total of such term or terms* for which such prisoner was sentenced . . . may be released on parole as hereinafter provided." *Id.* § 47-7-3(1) (1993) (emphasis added).[13]

Admittedly, because Garlotte's consecutive sentences include two concurrent life terms that together carry a statutory minimum ten-year period of incarceration, *see id.* (imposing 10-year minimum prison term for life sentences), the law requires that he complete that minimum period of service along with the minimum confinement specified for his three-year marijuana term prior to becoming eligible for parole. *See, e.g., Williams v. Puckett*, 624 So. 2d 496, 498-99 (Miss. 1993) (statutory mini-

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respect to each separate term—is of crucial significance, as a prisoner cannot lock in any earned time credits he or she has been assigned until discharged from confinement altogether. Thus, a prisoner serving consecutive five-year terms in Mississippi might receive as many as two and one-half years' worth of earned time credits by the so-called "discharge date" of his or her first term, but nevertheless would risk forfeiture of those credits, along with any credits thereafter earned, throughout the duration of the second term. *See Post v. Ruth*, 354 So. 2d 1111, 1113 (Miss. 1978) ("earned time does not become vested until the prisoner is entitled to be discharged after receiving credit for good time").

[13] Counsel for Respondent acknowledged this fact in an opinion letter less than two years ago, advising that "the Department of Corrections should compute parole eligibility pursuant to subsection (1)(c) of [Mississippi Code] section 47-7-3, by combining the total of consecutive sentences whenever the prisoner has accrued any meritorious earned time allowances." Opinion Letter from Mike Moore, Mississippi Attorney General, to Eddie Lucas, Commissioner of the Mississippi Department of Corrections, 1993 WL 294305 (Miss. A.G. July 21, 1993).

mum period of incarceration under robbery conviction must be added to required service time for forgery conviction in determining initial parole eligibility date).[14] This limited respect in which Garlotte's consecutive sentences are individuated under Mississippi law only underscores their functional unity, however, as it is clear (at least for purposes of Mississippi's parole statutes) that Garlotte will become eligible for release without having completed service of *either* his three-year marijuana sentence *or* his follow-on life sentences. Under Mississippi law, after ten years and ten months in prison—ten years of which must be attributed to his life sentences, *see* Miss. Code Ann. § 47-7-3(1) (1993) (prior to becoming eligible for parole, prisoner sentenced to life imprisonment must serve "not less than ten (10) years of such life sentence")—Garlotte will become parole-eligible. *See* note 14, *supra*. Yet at this crucial threshold of parole eligibility, he will technically remain saddled with a six-month

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[14] According to his Sentence Computation Record, Garlotte received six months' worth of "meritorious earned time" credits on the marijuana conviction. (Meritorious earned time credits are earned in connection with the completion of approved educational and work projects, Miss. Code Ann. § 47-5-142(2), and, unlike earned time for good conduct, can be applied to advance a prisoner's initial parole eligibility date, Miss. Code Ann. § 47-7-3(1)(c).) The Department of Corrections purported to apply this entire period to advance both Garlotte's discharge date *and* his parole eligibility date (the latter to December 2, 1995). (JA at 54) However, as Garlotte pointed out in both his petition and his briefs to the court below, Miss. Code Ann. § 47-7-3(1)(c) mandates that he serve at least ten months on the marijuana conviction prior to being released on parole, any meritorious earned time credits notwithstanding.

Thus, if Garlotte is unable to challenge his marijuana conviction, it appears that he will not become eligible for parole until March 31, 1996—ten years and ten months following the commencement of his confinement. (If, on the other hand, Garlotte's habeas corpus petition is granted and his marijuana conviction is ruled unconstitutional, his initial parole eligibility date will advance to June 1, 1995 (one year minus the meritorious earned time credits awarded in connection with his marijuana sentence).)

service obligation on the marijuana sentence in addition to the remainder of his concurrent life terms. For purposes of calculating Garlotte's possible release date on parole, Garlotte's consecutive sentences are essentially being discharged in dovetailed fashion.

Perhaps most significantly, Garlotte's parole eligibility date would have been the same even if the sequence in which Garlotte was required to serve his consecutive sentences were reversed. That is, had the marijuana sentence ostensibly been tacked on at the end of his concurrent life sentences, his minimum parole eligibility date would still have been a function of the combined minimum terms of incarceration for each sentence consecutively imposed. He would thus have become parole-eligible by early 1996 (as is the case now), even though, technically speaking, he would not have begun serving his marijuana sentence at all. It was perhaps for this reason that the District Attorney expressed indifference when the trial court proposed to have Garlotte's concurrent life sentences precede the marijuana sentence: "Either that way, your Honor or allow the three years to run first. In other words, we're just talking about a total of three years and then life or life and then three years." (JA at 43.) It would be profoundly unfair to deny Garlotte his day in federal court on the marijuana conviction where the order in which his consecutive sentences were to be served was so arbitrary,[15] and where no penological consequences turn on that sequence under the governing state law.

In any event, the State's administration of Garlotte's consecutive sentences belies its jurisdictional argument, and confirms that Garlotte's custody under his marijuana sentence survived its asserted "expiration." On Novem-

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[15] In fact, Mississippi courts often impose consecutive life sentences in advance of fixed-term sentences on multiple criminal counts. *See, e.g., Burrell v. State*, 613 So. 2d 1186 (Miss. 1993); *Meeks v. State*, 604 So. 2d 748 (Miss. 1992); *Luckett v. State*, 582 So. 2d 428 (Miss. 1991).

ber 13, 1992, the Mississippi Department of Corrections recomputed Garlotte's marijuana sentence. (JA at 53, 54.) The Department took this action in order to apply "meritorious earned time credits," *see* Miss. Code Ann. § 47-5-142 (1993), and Garlotte's Sentence Computation Record, as revised, clearly reflects the modest advancement in his parole eligibility date that this late-breaking award of credits occasioned. (JA at 54.) Similarly, the Department of Corrections credited Garlotte with substantial earned good time credits in 1992 pursuant to a recently enacted amendment to Mississippi's earned time statute. (JA at 54.)[16]

In short, just as in *Peyton*, Garlotte is subject to consecutive sentences that are for all intents and purposes unitary. In part as a function of Mississippi law, he faces an aggregate term of life imprisonment in which each of the consecutive sentences imposed on him are instrumental in determining the timing of his release from confinement. *See, e.g., Armstrong v. State*, 618 So. 2d 88, 90 (Miss. 1993) (noting inability of State to prove where one consecutive sentence ends and another begins).

II. *MALENG v. COOK* FORECLOSES JURISDICTION ONLY OVER CONVICTIONS THAT NO LONGER IMPOSE ANY PRESENT RESTRAINTS UPON THE HABEAS PETITIONER.

The Fifth Circuit acknowledged that Garlotte was imprisoned under consecutive sentences within the meaning of *Peyton*, but nevertheless found this Court's recent decision in *Maleng* to preclude a federal collateral challenge to Garlotte's marijuana conviction because that sentence had assertedly "expired." *Garlotte*, 29 F.3d at 217. This was error.

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[16] These earned good time credits could not have been directed to Garlotte's life sentences for the simple reason that prisoners confined under such sentences are not statutorily eligible for such credits. *See* Miss. Code Ann. § 47-5-139(1)(a).

The "question presented" in *Maleng*—"whether a habeas petitioner remains 'in custody' under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted"—makes abundantly clear that the decision has no relevance in the context of consecutive prison terms, where each such term remains instrumental in determining the prisoner's release date. *Maleng*, 490 U.S. at 492. Garlotte's marijuana conviction and sentence continue directly to impose a "present restraint" on his freedom. *Id.* That is what distinguishes Garlotte's challenge from the respondent's petition in *Maleng*, and that is what the Fifth Circuit overlooked.

In *Maleng*, respondent Cook had been convicted of robbery in 1958 and was sentenced by a Washington state court to a 20-year term of imprisonment. *Id.* at 489. In 1978, following the expiration of Cook's 1958 sentence, a Washington state court sentenced Cook to two life terms and one 10-year term on three convictions earned in 1976 while on parole from his 1958 sentence. *Id.* Under Washington law, Cook's 1958 robbery conviction was cited by the sentencing judge as a basis for lengthening his confinement under the 1978 sentences. *Id.* In 1985, Cook filed a petition for habeas corpus attacking his 1958 robbery conviction, but this Court held that Cook's sentence under that conviction had "fully expired," and that he was therefore no longer "in custody" under that conviction for purposes of 28 U.S.C. § 2241(c)(3). *Id.* at 492. According to the Court, the 1978 sentence enhancement was a mere "collateral consequence" of the 1958 conviction, and betrayed the fact that Cook's real quarrel was with the 1978 sentence as enhanced by the 1958 conviction, not with the 1958 conviction itself. *Id.* at 492-93.[17]

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[17] For that reason, the Court held that habeas jurisdiction lay for Cook to challenge the 1978 sentence on the basis that it had

It is clear from this Court's discussion in *Maleng* that Cook's "fully expired" 1958 robbery conviction was not directly determinative of his custodial status under his 1978 sentences; he suffered no "present restraint" therefrom. *Id.* A successful collateral challenge to that earlier conviction would have had no direct effect on the length of the subsequent sentences imposed upon him. Rather, only by thereafter petitioning for a reopening of the 1978 sentencing, or by bringing a collateral challenge to the 1978 sentence directly, would Cook have been able to affect his custodial status. *See, e.g., United States v. Tucker*, 404 U.S. 443, 444-45 (1972).

But *Peyton* establishes that when a prisoner is sentenced to a series of consecutive terms, he suffers a present restraint with respect to all such sentences throughout their aggregate duration.[18] That is, the first of two consecutive sentences does not "fully expire[]" until the prisoner is discharged from confinement altogether. Unlike the enhancement of Cook's 1978 sentence occasioned by his earlier conviction, an enhancement that was collateral in effect, the delay in the commencement of Garlotte's life sentences—and the concomitant delay in Garlotte's parole eligibility date—constitute continuing custodial effects of the marijuana sentence *itself* and not simply an enlargement of his subsequent life sentences. If Garlotte is successful in challenging his marijuana conviction, his parole eligibility date will be advanced through the direct operation of Mississippi law on the aggregate term of confinement. *See* Opinion Letter from Bill Allain, Mis-

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unconstitutionally been enhanced by the assertedly invalid 1958 conviction. *Id.* at 493-94.

[18] As noted above, *see* pp. 8-14 *supra*, *Peyton* recognized that where sentences are imposed consecutively, they are treated as a single aggregate sentence for many important purposes such as parole eligibility. As a result, it is impossible to determine where one sentence ends and a second begins. Where sentences are not consecutive, as in *Maleng*, the lines of demarcation between them are clear.

sissippi Attorney General, to John L. Hopkins, General Counsel to the Mississippi Department of Corrections, 1982 WL 44423 (Miss. A.G. May 3, 1982) (where first of two consecutive sentences is vacated, second sentence begins at date of imposition as if first sentence had never existed). Thus, unlike the earlier, discontinuous sentence at issue in *Maleng*, Garlotte's consecutively imposed marijuana sentence has not "fully expired" for purposes of 28 U.S.C. § 2241(c)(3).

In *Bernard v. Garraghty*, the Fourth Circuit applied this reasoning to sustain habeas jurisdiction over a petition indistinguishable in material respects from Garlotte's:

> Bernard's situation is quite distinct from Cook's [in *Maleng*] and similar in all relevant respects to Rowe's [in *Peyton*]. Bernard's sentences, like Rowe's, were imposed to be served consecutively. Unlike Cook, Bernard remained in physical custody of the Commonwealth at the time of filing his petition—custody that has never been interrupted since he began serving the consecutive sentences. . . . The Court's finding that Cook was no longer "in custody" for purposes of challenging his first conviction because he suffered no restraint on liberty from that sentence at the time of his challenge is consistent with *Peyton*'s determination that a sentence is not "fully expired" until the restraint from that sentence has terminated.

Bernard, 934 F.2d at 54-55.[19] Thus, the Fourth Circuit recognized that, when read together, *Peyton* and *Maleng* dictate the result sought by Garlotte in this case.

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[19] As earlier emphasized, Garlotte is not alone in taking the position that a federal court may consider a prisoner's habeas challenge to the first of two consecutive sentences, even where that sentence has technically expired. In decisions rendered after *Maleng*, the Fourth, Seventh and Eleventh Circuits have all held that federal habeas jurisdiction exists in circumstances indistinguishable from those here. *See* p. 7 *supra*.

Maleng simply has no application where, as with sentences imposed consecutively, the prisoner continues to suffer a "present restraint" from the conviction under challenge. The Fifth Circuit erred in concluding otherwise.

III. RECOGNITION OF HABEAS JURISDICTION OVER THE EARLIER OF GARLOTTE'S CONSECUTIVE SENTENCES IS CONSISTENT WITH THE REMEDIAL PURPOSES OF THE WRIT.

The Fifth Circuit's ruling that habeas corpus is unavailable to test Garlotte's marijuana conviction—a conviction that continues directly to impose restraints on his freedom —is inconsistent not only with *Peyton* and its logic, but also with this Court's broader tradition in interpreting the jurisdictional scope of the writ. Time and again, where a plausible basis for finding the habeas petitioner to be "in custody" is apparent, the Court has construed the statutory grant of habeas jurisdiction broadly in accordance with its remedial purposes, and has shied away from constructions of 28 U.S.C. § 2241(c)(3) that would have denied a federal remedy to those with constitutional claims.

That the writ of habeas corpus is remedial in nature cannot be denied. *Schlup v. Delo*, 115 S. Ct. 851, 863 (1995) ("habeas corpus is, at its core, an equitable remedy"); *see Peyton*, 391 U.S. at 63-65. Designed to "provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person," *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968), the writ's operation "is to a large extent uninhibited by traditional rules of finality and federalism." *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973). The remedial character of the writ has animated the Court's interpretation of 28 U.S.C. § 2241(c)(3). Thus, although frequently invited to narrow the writ's jurisdictional scope, this Court has "consistently rejected interpretations . . . that would suffocate the writ in stifling for-

malisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Id.* at 350. Instead, this Court has repeatedly held that the "in custody" requirement of § 2241(c)(3) must be interpreted broadly.[20]

Consistent with this prescription, the Court has defined the term "custody" in § 2241(c)(3) to include state-imposed restraints short of confinement in prison. *See Jones*, 371 U.S. at 239-40. For example, a prisoner placed on parole remains "in custody" for habeas purposes. *Id.* at 242-43. And a criminal offender who remains free on bail or recognizance pending implementation of his sentence qualifies as "in custody" under § 2241(c)(3). *See Hensley*, 411 U.S. at 351. In a similar vein, this Court has long since held that a prisoner serving a sentence in one jurisdiction can be considered "in custody" under a detainer lodged by another jurisdiction. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 488-89 (1973) (petitioner may challenge Kentucky detainer while serving in Alabama); *Estelle v. Dorrough*, 420 U.S. 534 (1975) (petitioner may challenge Texas detainer while serving federal prison term); *see also Nelson v. George*, 399 U.S. 224, 229 (1970) (petitioner may challenge adverse effects of North Carolina detainer on service of California sentence).

In addition to taking a broad view of the types of restraint that constitute "custody" under § 2241(c)(3), the Court has resisted constructions of the habeas statute

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[20] *See, e.g., Maleng*, 490 U.S. at 492 ("[W]e have very liberally construed the 'in custody' requirement for purposes of federal habeas"); *Hensley*, 411 U.S. at 350 n.8 (early cases proposing narrow reading of custody requirement described as "no longer . . . controlling"); *Carafas*, 391 U.S. at 239 (custody requirement must be read expansively in light of habeas statute's broad grant of authority to courts to dispose of habeas petitions "as law and justice require"); *Peyton*, 391 U.S. at 65 (broad reading of custody requirement "is consistent with the canon of construction that remedial statutes should be liberally construed").

that would have the effect of extinguishing jurisdiction that has properly attached. *See Carafas*, 391 U.S. at 239-40 (as long as prisoner is "in custody" as of time of habeas petition's filing, his subsequent release from prison does not defeat habeas jurisdiction). The *Carafas* decision is particularly instructive concerning the scope of the term "custody." There, the State of New York urged the Court that habeas jurisdiction could not be sustained under § 2241(c)(3) unless the petitioner remained "in custody" throughout the duration of the collateral proceeding, a position that rested on a plausible construction of the statute. *See, e.g., Parker v. Ellis*, 362 U.S. 574 (1960) (overruled by *Carafas*). The Court declined the invitation, observing that such a narrow construction of § 2241(c)(3) was inconsistent with the "province" of the writ—"to guarantee the most fundamental of all rights." The Court explained:

> [Carafas'] path has been long—partly because of the inevitable delays in our court processes and partly because of the requirement that he exhaust state remedies. He should not be thwarted now and required to bear the consequences of assertedly unlawful conviction simply because the path has been so long that he has served his sentence. *The federal habeas corpus statute does not require this result*, and *Parker v. Ellis* must be overruled.

391 U.S. at 240 (emphasis added) (footnotes omitted). The Court thus rejected its earlier conception of the "in custody" requirement because another plausible definition of the term was available that would more effectively advance the remedial purposes of the writ.

When the rule of construction pronounced in *Carafas* is properly applied to Garlotte's habeas petition, jurisdiction must be sustained under § 2241(c)(3). As described above, Garlotte's marijuana conviction—a conviction he contends is unconstitutional—continues both to postpone the commencement date of his subsequent sentences, and

to stand in the way of his earlier eligibility for release on parole. Because vacatur of his marijuana conviction would directly hasten his eligibility for release, Garlotte's petition falls squarely within the province of the writ.[21] As in *Carafas*, the text of § 2241(c)(3) does not compel adoption of a more stringent definition of the "in custody" requirement that would deny the writ to petitioners in Garlotte's circumstances. Under the rule of construction consistently employed by this Court, the Fifth Circuit's cramped view of § 2241(c)(3)'s jurisdictional grant must be rejected.

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[21] Although Carafas filed his petition while he was still in custody, the slow progress of his case through the lower state and federal courts resulted in his being released before his case could be heard. Similarly, Garlotte was disadvantaged by the fact that his marijuana sentence was shorter than the period required for compulsory prosecution of state post-conviction remedies. Thus, like Carafas, Garlotte "is suffering, and will continue to suffer, serious disabilities *because of the law's complexities and not because of his fault*, if his claim that he has been illegally convicted is meritorious. There is no need in the statute, the Constitution, or sound jurisprudence for denying to petitioner his ultimate day in court." *Carafas*, 391 U.S. at 239 (emphasis added). Applying *Carafas*, at least two courts have held that because 28 U.S.C. § 2254 requires the exhaustion of state remedies, a petitioner, like Garlotte, who begins the exhaustion process while still confined thereafter remains "in custody" for purposes of federal habeas jurisdiction. *Harrison v. Indiana*, 597 F.2d at 116-17 ("'He should not be thwarted now and required to bear the consequences of assertedly unlawful conviction simply because the path has been so long that he has served his sentence.'" (quoting *Carafas*, 391 U.S. at 240)); *United States ex. rel. Di Rienzo v. State*, 423 F.2d 224, 226 n.5 (3d Cir. 1970) (petitioner should not be barred from federal court because of time required to exhaust state remedies); *cf. Sibron v. New York*, 392 U.S. 40, 52-53 (1968) (Constitution does not contemplate that those deprived of constitutional rights should be left remediless simply because they have been awarded short sentences).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the decision below and remand this case for further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX A

TEXT OF STATUTORY PROVISIONS

28 U.S.C. § 2241(c)(3)

§ 2241. Power to grant writ

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

* * *

28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

* * *

Miss. Code Ann. § 47-5-138

§ 47-5-138. Earned time allowances; promulgations of rules and regulations; forfeiture generally; release of offender.

(1) The department may promulgate rules and regulations to carry out an earned time allowance program based on the good conduct and performance of an inmate. An inmate is eligible to receive an earned time allowance of one-half (½) of the period of confinement imposed by the court except those inmates excluded by law. When an inmate is committed to the custody of the department, the department shall determine a conditional earned time release date by subtracting the earned time allowance from an inmate's term of sentence and shall prepare a conditional earned time release date for each inmate.

(2) An inmate may forfeit all or part of his earned time allowance for a serious violation of rules. No forfeiture of the earned time allowance shall be effective except upon approval of the commissioner or his designee, and forfeited earned time may not be restored.

(3) An inmate who meets the good conduct and performance requirements of the earned time allowance program may be released on his conditional earned time release date.

Miss. Code Ann. § 47-5-139

§ 47-5-139. Certain inmates ineligible for earned time allowance; commutation to be based on total term of sentences; forfeiture of earned time in event of escape.

(1) An inmate shall not be eligible for the earned time allowance if:

(a) The inmate was sentenced to life imprisonment;

(b) The inmate was convicted as a habitual offender under Sections 99-19-81 through 99-19-87;

(c) The inmate has forfeited his earned time allowance by order of the commissioner;

(d) The inmate was convicted of a sex crime and has been denied parole based on the psychiatric or psychological examination required by law; or

(e) The inmate has not served the mandatory time required for parole eligibility for a conviction of robbery or attempted robbery with a deadly weapon.

(2) An offender under two (2) or more consecutive sentences shall be allowed commutation based upon the total term of the sentences.

(3) All earned time shall be forfeited by the inmate in the event of escape and/or aiding and abetting an escape. Provided, in the event of escape, the commissioner may restore all or part of the earned time if the escapee returns to the institution voluntarily, without expense to the state, and without act of violence while a fugitive from the facility.

(4) No inmate in any event shall have his sentence terminated by administrative earned time action until he is eligible for parole as provided in Title 47, Chapter 7, Mississippi Code of 1972.

(5) Any officer or employee who shall willfully violate the provisions of this section and be convicted therefor shall be removed from office or employment.

Miss. Code Ann. § 47-5-142

§ 47-5-142. Meritorious earned time.

(1) In order to provide incentive for offenders to achieve positive and worthwhile accomplishments for their personal benefit or the benefit of others, and in addition to any other administrative reductions of the length of an offender's sentence, any offender shall be eligible, subject to the provisions of this section, to receive meritorious earned time as distinguished from earned time for good conduct and performance.

(2) Subject to approval by the commissioner of the terms and conditions of the program or project, meritorious earned time may be awarded for the following: (a)

successful completion of educational or instructional programs; (b) satisfactory participation in work projects; and (c) satisfactory participation in any special incentive program.

(3) The programs and activities through which meritorious earned time may be received shall be published in writing and posted in conspicuous places at all facilities of the department and such publication shall be made available to all offenders in the custody of the department.

(4) The commissioner shall make a determination of the number of days of reduction of sentence which may be awarded an offender as meritorius earned time for participation in approved programs or projects; the number of days shall be determined by the commissioner on the basis of each particular program or project. However, in no event shall an offender be awarded in excess of ten (10) days reduction for each thirty (30) days of participation in such a program or project. Furthermore, an offender shall never be allowed to earn more than a total of one hundred eighty (180) days of meritorious earned time during the entire time he is under the jurisdiction of the Department of Corrections. The commissioner may authorize the awarding of all or any part of meritorious earned time upon an offender's entry into the correctional system.

(5) No offender shall be awarded any meritorious earned time while assigned to the maximum security facilities for disciplinary purposes.

(6) All meritorious earned time shall be forfeited by the offender in the event of escape and/or aiding and abetting an escape.

(7) Any officer or employee of the department who shall willfully violate the provisions of this section and be convicted therefor shall be removed from office or employment.

(8) An offender may forfeit all or any part of his meritorious earned time allowance for just cause upon the written order of the commissioner or his designee. Any meritorious earned time allowance forfeited under this section shall not be restored nor shall it be re-earned by the offender.

Miss. Code Ann. § 47-7-3.

§ 47-7-3. Parole of prisoners; conditions; determination of tentative hearing date.

(1) Every prisoner who has been or may hereafter be convicted of any offense against the State of Mississippi, and is confined in the execution of a judgment of such conviction in the Mississippi State Penitentiary for a definite term or terms of one (1) year or over, or for the term of his or her natural life, whose record of conduct shows that such prisoner has observed the rules of the Penitentiary, and who has served not less than one-fourth (¼) of the total of such term or terms for which such prisoner was sentenced, or, if sentenced to serve a term or terms of thirty (30) years or more, or, if sentenced for the term of the natural life of such prisoner, has served not less than ten (10) years of such life sentence, may be released on parole as hereinafter provided, except that:

* * *

(c) No one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowances, in which case he shall be eligible for parole if he has served (i) nine (9) months of his sentence or sentences, when his sentence or sentences is two (2) years or less; (ii) ten (10) months of his sentence or sentences when his sentence or sentences is more than two (2) years but no more than five (5) years; and (iii) one (1) year of his sentence or sentences when his sentence or sentences is more than five (5) years;

* * *

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FOR ARGUMENT

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Supreme Court, U.S.
FILED
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NO. 94-6790

In The Supreme Court of the United States

October Term, 1994

HARVEY F. GARLOTTE,
PETITIONER

VERSUS

KIRK FORDICE,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Whether a prisoner serving a series of consecutive sentences fails to meet the "in custody" requirement for purposes of 28 U.S.C. § 2241 (c) (3) when the first of two consecutive sentences has been fully served, and whether the court below correctly held that it lacked jurisdiction to hear petitioner's challenge to the first of two consecutive sentences which challenge was not filed until after the first sentence had expired.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. For Purposes of 28 U.S.C. § 2241 (c)(3), A Prisoner Serving Consecutive Prison Terms On Separate Counts Of Conviction Is Not "In Custody" Throughout The Aggregate Duration Of Those Terms So As To Allow An Attack Against One Of The Consecutive Prison Terms Which Has Fully Expired. 7

TABLE OF CONTENTS--Continued

A. A Fully Served Consecutive Sentence Must Not Be Aggregated With Other Consecutive Sentences For Purposes Of Applying § 2241 (c)(3)'s In Custody Requirement. 8

B. Mississippi Law Confirms That Garlotte Is Not Presently "In Custody" Under The Fully Expired Sentence. 15

II. *Maleng v. Cook* Forecloses Habeas Jurisdiction Over Convictions That Have Fully Expired. 21

III. Recognition of Habeas Jurisdiction Over the Earlier Of Garlotte's Consecutive Sentences Would Be An Unwarranted Expansion of the Remedial Purposes Of The Writ. 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES Page

Allen v. Dowd, 964 F.2d 745 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 335, 121 L.Ed.2d 253 (1992) 11

Bernard v. Garraghty, 934 F.2d 52 (4th Cir. 1991) . . . 13

Capetta v. Wainwright, 406 F.2d 1238 (5th Cir.), *cert. denied*, 396 U.S. 846 (1969) 22

Carafas v. LaVallee, 391 U.S. 234 (1968) 26

Fawcett v. Bablitch, 962 F.2d 617 (7th Cir. 1992) . . . 13

Fox v. Kelso, 911 F.2d 563 (11th Cir. 1990) 13

Garlotte v. Fordice, 29 F.3d 216 (5th Cir. 1994) . 1, 4, 5, 21-23

Garlotte v. State, 530 So.2d 693 (Miss. 1988) 3

Johnson v. O'Dea, 1994 U.S. App. LEXIS 3160 (6th Cir. 1994) 11, 23, 25, 27

Maleng v. Cook, 490 U.S. 488 (1989) 6, 21-23

McNally v. Hill, 293 U.S. 131 (1934) 8, 9

Peyton v. Rowe, 391 U.S. 54 (1968) . 6-10, 13-15, 27, 28

TABLE OF AUTHORITIES--Continued

United States v. Bustillos, 31 F.3d 931 (10th Cir. 1994) 12, 15

Williams v. Puckett, 634 So.2d 496 (Miss. 1993) . . 16, 18

STATUTES AND OTHER AUTHORITIES Page

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2241(c)(3) 2, 6-8

28 U.S.C. § 2254 . . . . . 2, 4, 15, 16

28 U.S.C. § 2255 12

Fed.R.Civ.P., Rule 58 4

Miss. Code Ann. § 47-5-138 (Supp. 1994) 2, 19, 20

Miss. Code Ann. § 47-5-139 (Supp. 1994) 2

Miss. Code Ann. § 47-5-142 (Supp. 1994) 2, 20

Miss. Code Ann. § 47-7-3 (1) (c) (Supp. 1994) . 2, 18, 19

Miss. Code Ann. § 99-39-1, et seq. (Supp. 1994) . . 3, 21

No. 94-6790

In the

Supreme Court of the United States

October Term, 1994

HARVEY F. GARLOTTE,

Petitioner,

v.

KIRK FORDICE,
GOVERNOR OF MISSISSIPPI,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENTS

This matter is before the Court on the Petition of Harvey F. Garlotte for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit wherein that court affirmed the denial of habeas corpus relief as to his conviction for possession for marijuana with intent to deliver.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported as *Garlotte v. Fordice*, 29 F.3d 216 (5th Cir. 1994). Joint Appendix (JA) at 25-29. The June 3, 1992, Order and Judgment of the United States District Court for the Southern

District of Mississippi are found at JA 18 & 19. The Report and Recommendation of the Magistrate Judge is found at JA 5-17.

JURISDICTION

The jurisdiction of this Court is invoked under authority of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254; Miss. Code Ann. § 47-5-138 (Supp. 1994); Miss. Code Ann. § 47-5-139 (Supp. 1994); Miss. Code Ann. § 47-5-142 (Supp. 1994); and Miss. Code Ann. § 47-7-3 (1) (Supp. 1994), are reproduced in Appendix A to the Brief for Petitioner.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below.

On September 16, 1985, Petitioner-Appellant, Harvey F. Garlotte entered pleas of guilty to one count of marijuana possession in an amount less than an ounce with intent to deliver and to two counts of murder. He was subsequently sentenced to serve terms of three (3) years pursuant to the marijuana charge and two concurrent life sentences pursuant to the charges of murder. The concurrent life sentences were to run consecutive with the three (3) year sentence imposed for marijuana possession. Although three (3) separate pleas were entered on September 16, 1985, the present appeal is

targeted exclusively at the plea of guilty to possession of marijuana with intent to deliver.

Garlotte filed a motion to vacate his plea of guilty to marijuana possession in the Circuit Court of Lamar County, Mississippi, under the provisions of Miss. Code Ann. § 99-39-1, et seq. (Supp. 1994). This post-conviction petition was denied by the circuit court as being "plainly" without merit on November 3, 1986.

On May 18, 1987, petitioner appealed this denial of post-conviction relief to the Mississippi Supreme Court raising five main issues. On August 10, 1988, the Mississippi Supreme Court denied the "facially meritless motion for post-conviction relief" in a written opinion. *Garlotte v. State*, 530 So.2d 693 (Miss. 1988). A petition for rehearing was denied on September 28, 1988.

On or about October 20, 1989, petitioner sought relief by means of a Petition for Writ of Habeas Corpus filed with the United States District Court for the Southern District of Mississippi, Hattiesburg Division raising nine claims. On November 17, 1989, respondents filed a Motion to Dismiss for Failure to Exhaust, and on August 29, 1990, the magistrate judge recommended that the habeas petition be dismissed without prejudice. On June 25, 1991, after reviewing an Order from the Mississippi Supreme Court, the District Court remanded to the Magistrate Judge "for reconsideration." Respondents, on July 29, 1991, filed a Brief on Remand submitting that petitioner "seem[ed] to have exhausted his state court remedies," stating:

> The reason for the failure of the state to discover these two grounds is that they were not included in the

application to the Mississippi Supreme Court, but in the proposed filing before the circuit court. This proposed filing was attached as the ninth exhibit and appeared, without careful reading, to be part of the prior pleading filed in another case.

On February 13, 1992, the magistrate judge,[1] after reviewing the case on its merits, filed his Report and Recommendation, and recommended that the petition for writ of habeas corpus be denied. JA 5-17. After the Report and Recommendation was issued respondent filed Respondent's Clarification of Exhaustion Issue in Report and Recommendation of United States Magistrate Judge on February 19, 1992. JA 20-23. After fully reviewing the Magistrate Judge's report and recommendation, the objections of petitioner and the response of the State, the District Court, on June 3, 1992, adopted the Report and Recommendation as the finding of the Court and dismissed the habeas petition. An order and judgment were entered as required by Rule 58, Fed.R.Civ.P. JA 18 & 19.

On August 4, 1993, the Court of Appeals for the Fifth Circuit ordered the district court to supplement the record with the State's Brief on Remand. JA 3-4. On March 3, 1994, a certificate of probable cause was granted by the Fifth Circuit. After briefing, on August 19, 1994, the Fifth Circuit affirmed the district court's dismissal, but on the separate ground that the district court lacked jurisdiction pursuant to 28 U.S.C. § 2254. *Garlotte v. Fordice*, 29 F.3d 216 (5th Cir. 1994).

---

[1]At this point, the instant case had been assigned to all three Southern District magistrate judges at different times.

B. Statement of Facts.

In *Garlotte v. Fordice*, 29 F.3d 216 (5th Cir. 1994), the court below summarized the facts as follows:

> In 1985 Garlotte pleaded guilty to one count of possession with intent to deliver or sell one ounce or less of marijuana and was sentenced to three years imprisonment. On the same day he pleaded guilty to two counts of murder and received two life sentences which the court ordered to run concurrently. The court also ordered that the concurrent life sentences were to run "consecutive, and after" the three year marijuana conviction. Garlotte did not appeal his marijuana conviction, and his two state post-conviction motions were denied. He is currently eligible for parole consideration on March 1, 1996.
>
> In 1989, Garlotte filed a federal petition for *habeas corpus* relief challenging the 1985 marijuana conviction. Fordice filed a motion to dismiss for failure to exhaust state habeas remedies, and the magistrate judge recommended that the petition be dismissed with prejudice. The district court remanded the matter to the magistrate for reconsideration.
>
> On remand, the magistrate recommended dismissing the petition without requiring Fordice to file an answer, concluding that although it was unclear whether Garlotte had exhausted his state remedies, even if they were unexhausted the requirement should be waived because exhaustion would be futile. After reviewing the magistrate's Report and Recommendation, the district court adopted it,

dismissed the petition, and denied Garlotte's request for a Certificate of Probable Cause.

Garlotte, 29 F.3d at 217.

SUMMARY OF ARGUMENT

The Fifth Circuit properly interpreted this Court's decision in *Peyton v. Rowe*, 391 U.S. 54 (1968), in affirming the district court's dismissal of the writ of habeas corpus due to lack of jurisdiction as petitioner no longer met the "in custody" requirement for purposes of 28 U.S.C. § 2241(c)(3). Petitioner's three (3) year sentence for possession of marijuana with intent to deliver was fully expired before he filed his petition for writ of habeas corpus challenging that conviction. Once a sentence of a series of consecutive sentences has expired it can not be collaterally attacked as the convict is no longer "in custody" for the purposes of § 2241(c)(3). In *Maleng v. Cook*, 490 U.S. 488 (1989), held that once a conviction is discharged a petitioner is no longer "in custody" for the purposes of § 2241 (c) (3).

The Court in *Peyton*, was concerned with the expeditious determination of habeas petitions on convictions to be served in the future. The reasoning of *Peyton* does not logically apply in reverse. When one of several consecutive sentences has expired the convict has already had the opportunity to challenge that conviction while in custody on that conviction. The goal of speedy determination of future convictions is not present in this situation. In fact, the converse of this goal would result. To adopt petitioner's position would allow petitioner's to withhold claims against the validity of convictions for years. When these delayed claims are then brought the whole reason for *Peyton* is

undermined. Under Mississippi law consecutive sentences, whether imposed at the same time or at different times, are treated as separate sentences and not as a unitary sentence. *Williams v. Puckett*, 634 So.2d 496 (Miss. 1993). Garlotte is not "in custody" pursuant to the marijuana conviction for purposes of § 2241 (c) (3).

ARGUMENT

I. For Purposes of 28 U.S.C. § 2241 (c)(3), A Prisoner Serving Consecutive Prison Terms On Separate Counts Of Conviction Is Not "In Custody" Throughout The Aggregate Duration Of Those Terms So As To Allow An Attack Against One Of The Consecutive Prison Terms Which Has Fully Expired.

In *Peyton v. Rowe*, 391 U.S. 54 (1968), this Court indeed held that a prisoner serving consecutive sentences is "'in custody' under any one of them for purposes of § 2241 (c)(3)." 391 U.S. at 67. However, the facts upon which *Peyton* rests are wholly distinguishable from those presented in the instant case. In *Peyton*, the petitioner had not yet begun to serve the prison term imposed for the challenged conviction. In contrast, Garlotte had already fully served the prison term imposed for the challenged marijuana conviction at the time he filed his petition for writ of habeas corpus. In applying the rationale of *Peyton*, the lower federal courts have reached differing conclusions when presented with a fact situation such as that presented here. Because of this conflict of the circuits this Court must resolve this question.

The Fifth Circuit, in affirming the district court's dismissal of the writ of habeas corpus in this case, stated:

> In *Peyton*, the Supreme Court held that a petitioner who was serving consecutive sentences imposed by the state court is "in custody" under any one of those sentences. *Peyton,*, 391 U.S. at 67, 88 S.Ct. at 1556. Unlike Garlotte, however, the petitioners in *Peyton* were challenging a sentence they had not yet begun to serve. Garlotte attempts only to challenge a sentence that is "fully expired" under the definition established by the Supreme Court in *Maleng*. Therefore, Garlotte's challenge to his "fully expired" marijuana conviction is not controlled by the Supreme Court's decision in *Peyton* because he is not attempting to challenge a sentence he has not yet begun to serve.
>
> *Garlotte*, 29 F.3d at 218.

The net result of *Peyton* is simply that a prisoner "in custody" under one sentence may attack a sentence he is scheduled to serve in the future. Consequently, the Fifth Circuit did not err in finding that Garlotte failed to meet the jurisdictional "in custody" requirement of § 2241 (c)(3).

A. A Fully Served Consecutive Sentence Must Not Be Aggregated With Other Consecutive Sentences For Purposes Of Applying § 2241 (c)(3)'s In Custody Requirement.

In *Peyton*, this Court addressed "whether a district court may entertain a petition for a writ of habeas corpus from a prisoner incarcerated under consecutive sentences who claims that a sentence that he is scheduled to serve in the future is invalid because of a deprivation of rights guaranteed by the constitution." 391 U.S. at 55. In deciding *Peyton*, this Court revisited the decision in *McNally v. Hill*, 293 U.S. 131

(1934), to determine what is sufficient to constitute being "in custody" for habeas corpus purposes. In *McNally*, the Court held that "the habeas corpus statute does not authorize attacks upon future consecutive sentences." *Id.* The *Peyton* Court held that the decision in *McNally* was "compelled neither by statute nor by history and that today it represents an indefensible barrier to prompt adjudication of constitutional claims in the federal courts." *Id.*

The driving force that underscores the entire *Peyton* holding is the "harshness of a rule which may delay determination of federal claims for decades." *Id.* at 61. The Court emphasized that it could not require a petitioner to wait to meet the "in custody" requirement defined by the *McNally* Court because "[b]y that time, dimmed memories or the death of witnesses is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact." *Peyton* at 62. The Court went on to say:

> Postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice. As the Court of Appeals observed:
>
> > Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the Commonwealth of Virginia may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial. The greater lapse of time the more unlikely it becomes that the state could

> reprosecute if retrials are held to be necessary. It is to the great interest of the Commonwealth and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established. 383 F.2d at 715.

391 U.S. at 62-63 [citations omitted].

While consecutive prison sentences currently being served or yet to be served are unitary and should be aggregated, once any one of such consecutive sentences has been fully served it is no longer amenable to a habeas challenge because the prisoner is no longer "in custody" pursuant to such a fully served sentence. This logical reasoning is clearly consistent with the rationale of *Peyton*, which allowed the prisoner to attack a sentence yet to be served in order to facilitate judicial disposition of habeas claims before the passage of time could hinder assertion or defense of such claims. No artificial separation of terms is necessary to this end where as in the case *sub judice*, the sentence imposed for the challenged conviction has unequivocally expired prior to the habeas attack.

Other circuits have considered this question with conflicting results. Although the opinion is unpublished, the Court of Appeals for the Sixth Circuit offers this persuasive reasoning consistent with the holding of the Fifth Circuit:

> We think that the rationale of *Peyton* and the harm which it sought to alleviate apply with equal force to the situation in which a prisoner waits to bring his petition until the sentence which he seeks to attack has expired. Indeed, one of the situations of prejudice

> enumerated in *Peyton* is the very claim being pursued by the petitioner in this--that he was coerced into entering a guilty plea. And as the Supreme Court quoted with approval from the appellate court opinion in *Peyton* "If the allegations of his petition are false in fact, the [state] may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial." *Id.* at 62. That prejudice is no less inconsistent with the purposes of the writ merely because it results from [*8] time which has already passed before the petition may be filed.

Johnson v. O'Dea, 1994 U.S. App. LEXIS 3160 at *7-8 (6th Cir. 1994).

The United States Court of Appeals for the Eighth Circuit was presented with a similar question in *Allen v. Dowd*, 964 F.2d 745 (8th Cir. 1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 335, 121 L.Ed.2d 253 (1992). There Allen argued that while his earlier expired sentence was not used to enhance the sentence he was currently serving, the earlier conviction affected his current sentence because it delayed his release date. The Eighth Circuit, held:

> His argument overlooks the fact that nowhere in his petition does he challenge his later conviction. Allen expressly restricts himself to challenging the 1982 conviction for receiving stolen property. In *Taylor v. Armontrout*, 877 F.2d 726 (8th Cir. 1989) (per curiam), we affirmed a dismissal where the petitioner had served the sentence challenged in his habeas petition and had failed to assert in his petition an attack against a current sentence, even though he argued on

> appeal that the earlier conviction resulted in an enhancement of his later sentence. Upholding the district court's finding that the petitioner did not satisfy the "in custody requirement," we concluded: "it is still open to appellant to challenge his [later] sentence, and to assert as a ground for that challenge the invalidity of the previous, underlying 1982 conviction." *Id.* at 727.
>
> We thus reject Allen's argument that he is entitled to proceed under *Maleng*. He is, of course, entitled to file a new petition attacking the conviction for which he is now in custody, but we also observe that he must abide by the usual requirement of exhaustion of state remedies. *See Flittie v. Solem*, 882 F.2d 325, 328 & n. 2 (8th Cir. 1989) (Bean, J., concurring specially).

964 F.2d at 746.

When considering a challenge to a federal conviction under 28 U.S.C. § 2255, the Court of Appeals for the Tenth Circuit, in *United States v. Bustillos*, 31 F.3d 931 (10th Cir. 1994), dismissed a habeas challenge for lack of jurisdiction. Bustillos was sentenced to serve consecutive sentences of three (3) years and five (5) years. These sentences were imposed on the same day for separate convictions. Bustillos filed a habeas petition challenging the conviction resulting in the three (3) years sentence some six (6) years after the sentences were imposed. On appeal, like in the case at bar, the government challenged the subject matter jurisdiction of the court to hear the habeas challenge on the grounds that the three (3) year sentence had been fully served when the habeas petition was filed. The court held that it was without

jurisdiction to hear the case and dismissed the case for lack of jurisdiction. 31 F.3d at 934.

At odds with these rulings are decisions from the Court of Appeals for the Fourth, Seventh and Eleventh Circuits. *See Bernard v. Garraghty*, 934 F.2d 52 (4th Cir. 1991); *Fawcett v. Bablitch*, 962 F.2d 617 (7th Cir. 1992); *Fox v. Kelso*, 911 F.2d 563 (11th Cir. 1990). The Fourth and Eleventh Circuits interpret *Peyton* to hold that once a petitioner is in custody on consecutive sentences he may challenge any one of them at any time no matter whether that sentence has expired or not. The Seventh Circuit in *Fawcett* equated consecutive sentences with enhanced sentences and held that the *Peyton* rationale applied because "a consecutive sentence uses the first conviction to postpone release on the second." 962 F.2d at 618. These three circuits base their decisions on the single sentence from *Peyton* stating that "a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of" collateral attack. None of these three circuits makes any analysis of the reason for the holding in *Peyton*.

Respondent admits that the earlier of consecutive sentences determines the timing of commencement and expiration of subsequent consecutive sentences, but only until the earlier sentences have either expired or been vacated. Once an earlier consecutive sentence has expired or been vacated, the next in sequence of the remaining consecutive sentences determines the date of commencement and expiration of any subsequent consecutive sentences.

In *Peyton*, the challenged conviction was a sentence that had not yet commenced. That sentence continued to determine the length of remaining confinement at the time the habeas petition was filed. The challenge to Rowe's conviction

with its yet-to-be-served sentence was asserted in a timely fashion and could have been brought at that time regardless of whether the other consecutive sentences had been imposed. Garlotte, on the other hand, would be completely foreclosed from bringing his habeas petition at this point in time, i.e., after expiration of his sentence, were it not for the remaining consecutive sentences.

The *Peyton* Court wrote:

> *McNally* is also at odds with the purpose of the writ of habeas corpus in another respect. As noted above, a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty. Calendar congestion, considerations of federalism, see, e.g., *Fay v. Noia*, 372 U.S. at 415-420, 9 L.Ed.2d at 854-857; *Ex Parte Royale*, 117 U.S. 241, 29 L.Ed.2d 868, 6 S.Ct. 734 (1886), and the exigencies of appellate review account for largely unavoidable delays in the processing of criminal cases. But the prematurity rule of *McNally* in many instances extends without practical justification the time a prisoner entitled to release must remain in confinement. Rowe and Thacker eventually may establish that the convictions they challenge were obtained in violation of the Constitution. If they do, each day they are incarcerated under those convictions while their cases are in the courts will be time that they might properly have enjoyed as free men. Common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time.

Peyton at 63-64.

The basis for the holding of *Peyton* is to allow a habeas petitioner to bring his challenge to future sentences at the earliest possible time, not to delay them until after they expire. The reasoning of the Fifth, Sixth, Eighth, and Tenth Circuits is the more logically in line with the rationale of *Peyton*. Respondent urges this Court to decline Petitioner's invitation to reward multiple offenders with what would be, in effect, an extended time period in which to file a habeas petition on a conviction whose sentence had expired simply because the conviction and sentence were imposed to run in a consecutive manner.

B. Mississippi Law Confirms That Garlotte Is Not Presently "In Custody" Under The Fully Expired Sentence.

Petitioner argues that Mississippi treats consecutive sentences as a unitary term of confinement. The respondent submits that state law is not controlling on the issue of jurisdiction under 28 U.S.C. § 2254. In defense of a challenge to the jurisdiction of the court to hear a habeas petition, Fernando Bustillos claimed he was "in custody" arguing that 18 U.S.C. § 3584(c) required the Federal Bureau of Prisons to treat multiple terms of imprisonment as a "single, aggregate term of imprisonment." *Bustillos*, 31 F.3d at 934. He argued the language of the statute supported his argument that he was "in custody" and could challenge a conviction after the sentence had expired. The Tenth Circuit rejected this argument first by stating that the statute did not apply retroactively to Bustillos. Further, the Tenth Circuit stated:

> Moreover, the Federal Bureau of Prison's treatment of multiple sentences for administrative purposes is not

> binding on a court in determining whether it has jurisdiction to address a collateral challenge filed pursuant to § 2255.
>
> 31 F.3d at 934.

Likewise, respondent would submit that the manner in which Mississippi treats consecutive sentences is not controlling on whether or not a federal court can entertain a collateral challenge under § 2254.

Moreover, petitioner's argument that Mississippi law treats consecutive sentences as a unitary term of confinement is completely refuted by the decision of the Mississippi Supreme Court in *Williams v. Puckett*, 634 So.2d 496 (Miss. 1993). There the state court held:

> More recently, in *Milam v. State*, 578 So.2d 272 (Miss. 1991), this Court had occasion to speak to the question of the proper treatment of consecutive sentences, one of which is a mandatory sentence for which no parole is available. . . .
>
> We held that Milam's parole date, without reference to good time, had been calculated in accordance with Mississippi law. *Id.* at 273-74. The Court said in part:
>
> > It goes without saying that, when a person is by express order providing therefor sentenced to serve consecutive terms, imprisonment on the second, or each subsequent conviction, shall commence at the completion of the service of the term for the preceding

> conviction. Miss. Code Ann. § 99-19-21 (1972). His parole eligibility is a function of the law's response to those consecutive sentences. *Davis v. State*, 429 So.2d 262, 263 (Miss. 1983).

Id. at 274. . . .

Williams claims that the wording of § 47-7-3(1)(d), would indicate that he is entitled to parole on these consecutive sentences after the service of ten years. Specifically, he focuses upon the phrase "term or terms" as used in that statute providing that one sentenced for robbery for a term or terms in excess of ten years shall be eligible for parole in ten years. He suggest that his robbery sentence in combination with his forgery sentence are "terms" within the meaning of the statute and that the statute dictates that he is eligible for parole in ten years. This is not an issue discussed in *Taylor, Milam* or *Davis*. Interpretation of this language was the genesis of the dispute presented in *Taylor* but the soundness of the agency interpretation was not at issue.

We do not consider this an open issue, however, given the fact that the interpretation given the statute by the agency chosen to administer it should be accorded deference. *Gill v. Dept. of Wildlife Conservation*, 574 So.2d 586, 593 (Miss. 1990). Here, the parole board interpretation has operated with our implicit approval for fifteen years. *See, Taylor*, 365 So.2d 621. If that interpretation is in error it should be corrected by the legislature. Given the law as presently interpreted the Department of Corrections

> has correctly calculated Williams' date of eligibility for parole.
>
> 624 So.2d at 499.

In *Williams*, the Mississippi Supreme Court made it clear that consecutive sentences are treated separately for parole purposes. They are not treated as a unitary sentence.

Under the state law, as espoused by the Mississippi Supreme Court, Garlotte was required to serve at least ten months on his marijuana conviction before becoming eligible for parole. Miss. Code Ann. § 47-7-3 (1) (c) (Supp. 1994).[2] This sub-section reads:

> (c) No one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowances, in which case he shall be eligible for parole if he has served (i) nine (9) months of his sentence or sentences, when his sentence or sentences is two (2) years or less; (ii) *ten (10) months of his sentence or sentences when his sentence or sentences is more than two (2) years but no more than five (5) years*; and (iii) one (1) year of his sentence or sentences when his sentence or sentences is more than five (5) years; [Emphasis added].
>
> Petitioner's Appendix at 5a.

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[2]This code sub-section has remained unchanged since the date of petitioner's conviction and sentence.

Wholly separate from this ten month requirement, Garlotte must serve at least ten years on his concurrent life sentences before becoming eligible for parole. Miss. Code Ann. §47-7-3 (1) (Supp. 1994). Petitioner's Appendix at 5a.

Garlotte relies on two Sentence Computation Date Sheets furnished him by the Mississippi Department of Corrections (DOC) as proof of the unitary nature of the sentences. One of these sheets, dated October 19, 1988, sets his parole eligibility date at May 1, 1996. JA 52. The second, dated November 13, 1992, is accompanied by a Sentence Computation Record sheet, and sets his parole eligibility date for December 2, 1995. He makes much of the difference in the parole eligibility date in the two separate documents. However, when we look to these time computation records we find an easy answer to the difference. The first sheet was prepared before the 1992 amendment to Miss. Code Ann. § 47-5-138 (Supp. 1994), the second after.[3] The net effect of the retroactive application of the changes in the earned time provisions of § 47-5-138, was to advance Garlotte's parole eligibility date from May 1, 1996 to December 2, 1995. Garlotte was given the benefit of the new provisions of §47-5-138 in the computation of his parole eligibility date for the concurrent life sentences.

On September 16, 1985, Garlotte was convicted and sentenced to serve three years in the custody of the DOC. This logically would make his discharge date for that crime September 15, 1988. That date was reduced by the application of certain statutory provisions, some that were applied retroactively. Looking to the computations by the

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[3]This code section is that referred to as Senate Bill #2030 on the Sentence Computation Record. JA 54.

DOC found in the Sentence Computation Record complied on November 13, 1992, (JA 54) we find that Garlotte's discharge date was first determined to be March 11, 1987. This date was figured from September 16, 1985, the date he was received as an inmate with the DOC. This computation reflects the credit for one-half (1/2) of the period of confinement imposed by the court provided for by the retroactive application of § 47-5-138. Then an additional one hundred and three (103) days was subtracted from the total for the time Garlotte spent in jail awaiting trial. This made his discharge date November 28, 1986. This was then reduced by one hundred eighty (1980) days of meritorious earned time pursuant to Miss. Code Ann. § 47-5-142 (Supp. 1994). This made Garlotte eligible for parole on the marijuana sentence on December 2, 1986.[4]

Since Garlotte had consecutive sentences to serve he was not physically released from custody after his marijuana conviction expired; instead, he served the entire sentence imposed, as reduced by statutory earned time. The sentence on the marijuana conviction expired, according to the calculations of the Mississippi DOC, on June 1, 1986. Garlotte is now in custody on the concurrent life sentences imposed for the murder convictions. Just as the time has expired for Garlotte to be paroled on the marijuana conviction or to bring a state post-conviction collateral relief action under

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[4]According to the Mississippi Department of Corrections, Records Department, the petitioner's earliest parole eligibility date is December 2, 1995. JA 54. While inquiring into the exact meaning of the dates listed in this computation record counsel discovered that Garlotte's earliest parole date was incorrectly figured as meritorious earned time was included in the calculation of earliest parole date on the marijuana sentence. His earliest parole date will actually be sixty-two (62) days later than listed on the sheet.

Miss. Code Ann. § 99-39-1, *et seq.*,[5] the time has similarly expired for Garlotte to bring a federal habeas attack against his expired marijuana conviction.

II. *Maleng v. Cook* Forecloses Habeas Jurisdiction Over Convictions That Have Fully Expired.

The Fifth Circuit correctly determined that *Maleng v. Cook*, 490 U.S. 488 (1989), precludes a federal collateral challenge to Garlotte's marijuana conviction because that sentence had expired. *Garlotte*, 29 F.3d at 217. The court below points out in its opinion:

> Garlotte does not challenge Fordice's contention that his three year marijuana sentence has expired, but argues instead that the Supreme Court's decision in *Peyton v. Rowe*, 391 U.S. 54, holding that a prisoner serving consecutive sentences is "in custody" under any one of the sentences, controls this case. Garlotte further argues that there exists a "positive and demonstrable" nexus between his current custody under the murder sentences and the prior marijuana conviction such that his challenge meets the jurisdictional requirements of § 2254. *Willis v. Collins*, 989 F.2d 187 (5th Cir. 1993), *quoting Young v. Lynaugh*, 821 F.2d 1133, 1137 (5th Cir. 1987), *cert. denied*, 484 U.S. 986, 108 S.Ct. 1040, 98 L.Ed.2d 501 (1987), and *cert. denied*, 484 U.S. 1071, 108 S.Ct. 1040, 98 L.Ed.2d 1004 (1988). Specifically he contends that but for his marijuana conviction, he

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[5]Assuming that a post-conviction collateral relief action had not already been brought in the state court.

would have been eligible for parole consideration on June 5, 1995, instead of March 1, 1996.

This Court has held that a petitioner can challenge a fully expired sentence if the expired sentence delayed the time for which the petitioner could receive credit for time served on the current sentence. *Capetta v. Wainwright*, 406 F.2d 1238, 1239 (5th Cir.), *cert. denied*, 396 U.S. 846, 90 S.Ct. 55, 24 L.Ed.2d 96 (1969). Since *Capetta*, however, the Supreme Court stated in *Maleng*:

> We have never held, however, that a habeas petitioner may be "in custody" under a conviction when the sentence imposed for that conviction has fully expired at the time the petition is filed.

Maleng, 490 U.S. at 491, 109 S.Ct. at 1925.

Garlotte, 29 F.3d at 218. The Fifth Circuit followed the rule established by *Maleng* in Garlotte's case, at least to the extent that *Maleng* and *Capetta v. Wainwright*, 406 F.2d 1238, 1239 (5th Cir.), *cert. denied*, 396 U.S. 846 (1969), are inconsistent.

The Court went on to explain that Garlotte's contention--that because his parole consideration date was delayed by the marijuana conviction the requisite nexus between the marijuana conviction and the murder conviction existed--was without merit. Citing *Maleng*, the Fifth Circuit found that because "Garlotte's parole delay merely constitutes a collateral consequence of his marijuana conviction, he has failed to allege a 'positive and demonstrable' nexus between

the marijuana conviction and the murder sentences he is now serving in order to meet the requirement of the *Maleng* exception established by this Court in *Willis*." *Garlotte*, 29 F.3d at 218.

As in *Maleng*, any indirect effect of Garlotte's expired sentence on his release date is merely a "collateral consequence" of the marijuana conviction. *Maleng*, at 492-93. Garlotte can not be said to suffer any "present restraint" from the marijuana conviction as the sentence imposed for that conviction has fully expired. If Garlotte had been released for even one day between the expiration of his sentence for the marijuana conviction prior to imposition and commencement of his concurrent life sentences, he would clearly be precluded from collaterally challenging the marijuana conviction. Just because the marijuana sentence was to be served prior to the murder sentences should not be held to grant him the right to challenge that expired sentence.

Additionally, no other collateral consequences are created by the expired sentence. As noted under the rationale of the Sixth Circuit in the unpublished opinion in *Johnson v. O'Dea*:

> The Supreme Court's ruling in *Maleng v. Cook*, 490 U.S. 488, 104 L.Ed.2d 540, 109 S.Ct. 1923 (1989), has limited any argument that *Peyton* can be read beyond overruling *McNally* and its rule on prematurity. In *Maleng*, the Supreme Court held that a habeas petitioner does not remain "in custody" after a sentence has fully expired merely because the prior conviction will be used to enhance a sentence imposed for subsequent crimes for which petitioner may be convicted. *Id.* at 492. Johnson's two year sentence,

along with the time spent on parole for his 1980 conviction, clearly expired before 1990. The record does not indicate that any of Johnson's subsequent sentences were exacerbated by his 1980 conviction. Thus, even a narrow application of *Maleng* results in a finding that Johnson is not suffering any collateral consequences for his 1980 conviction and is thus, not "in custody." [n2]

[n2] We recognize that two other circuits have taken a contrary position holding that *Maleng v. Cook, supra*, is inapposite and that the "in custody" issue in the context of expired sentences is governed by *Peyton*. We find theses cases unpersuasive. *Fawcett v. Bablitch*, 962 F.2d 617 (7th Cir. 1992) simply cited *Peyton v. Rowe, supra*, for the proposition that a prisoner in custody on any of consecutive sentences is in custody on all of them, but did not mention or discuss the actual facts, rationale and entire holding of *Peyton*. *Bernard v. Garraghty*, 934 F.2d 52 (4th Cir. 1991) contains some discussion, but concludes that the difference between Rowe's attempt to challenge a sentence which he had not yet begun to serve and Bernard's attempt to challenge a consecutive sentence he had already served was "irrelevant," *id.* at 55, and that *Peyton* had held "dispositive the fact that the Virginia parole statute provided that Rowe's parole eligibility was to be determined on the basis of an aggregate sentence of fifty years, the total of his thirty-year and twenty-year sentences." *Id.* at 55. Without commenting on whether the Virginia parole statute was "dispositive," we note that the *Peyton* Court discussed that statute solely in terms of the need for habeas petitioners to be able to attack sentences not yet being

served because of the damage to their claims which the passage of time might do.

Johnson v. O'Dea, 1994 U.S. App. LEXIS 3160, at *9.

Consequently, the delay in commencement of Garlotte's life sentences and delay in his parole eligibility date for those life sentences is at most a collateral consequence of the expired marijuana sentence. While it is true that had Garlotte successfully challenged his marijuana conviction prior to expiration of its sentence, commencement of his life sentences and his parole eligibility date on those sentences would have been advanced. Nonetheless, Garlotte's failure to assert a habeas challenge to the marijuana conviction while "in custody" for that conviction should not be fostered by this Court by a finding of "present restraint" directly attributable to his expired sentence. Any present restraint suffered by Garlotte is only attributable to his life sentences. Garlotte is not presently restrained by his marijuana sentence; is not encumbered by any collateral consequences of that expired sentence; and, therefore cannot be "in custody" for purposes of challenging the marijuana conviction.

III. Recognition of Habeas Jurisdiction Over the Earlier Of Garlotte's Consecutive Sentences Would Be An Unwarranted Expansion of the Remedial Purposes Of The Writ.

While respondent acknowledges that the statutory grant of habeas jurisdiction is broadly construed to effectuate its remedial purposes. Refusal to expand habeas jurisdiction to allow challenges to a conviction after expiration of its sentence would not deny a federal remedy to one with a constitutional

claim to any greater extent than do procedural bars. The remedy provided by habeas corpus is available to prisoners serving consecutive sentences, just as it was available to Garlotte, so long as they assert the challenge in a manner sufficiently timely to invoke habeas jurisdiction, *i.e.*, while "in custody" for the conviction challenged.

At the time Garlotte filed his habeas petition his marijuana sentence had already expired. Consequently, his confinement at the time he filed his petition was not attributable to the marijuana conviction, he was not "in custody" for purposes of habeas jurisdiction, and jurisdiction could not properly attach. As Garlotte is currently serving his concurrent life sentences, his marijuana conviction does not continue to postpone commencement of these life sentences. *Cf. Carafas v. LaVallee*, 391 U.S. 234 (1968) (habeas jurisdiction will not be extinguished by expiration of sentence following initial attachment of jurisdiction).

Additionally, the Sixth Circuit had this to say regarding the expansion of habeas jurisdiction now urged by Garlotte:

> In dealing with the application of *Peyton* to past confinements, this Court has stated:
>
> > Apparently, petitioner's reasoning is that if under *Peyton* the "in custody" requirement must be read to allow prisoners to use habeas corpus petitions to challenge future confinement, the same analysis should logically work in reverse to compel the conclusion that the "in custody" language permits prisoners to challenge past confinement.

> Neither the language of the statute nor the manifest purpose of the writ goes that far. *Ward v. Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984). This Court has clearly indicated an intention not to "open the door" to the creation of jurisdiction for sentences which have been fully served. *Id.* n 1.
>
> ---
>
> n[1] This Court Circuit declined to follow the reasoning set forth by the Seventh circuit in *Harrison v. Indiana*, 697 F.2d 115 (7th Cir. 1979). In *Harrison* the court held that since the first sentence delayed the commencement of the second sentence and thus delayed the petitioner's release date, the petitioner was in custody for the first sentence so long as he remained imprisoned.

Johnson v. O'Dea, 1994 U.S. App. LEXIS 3160, at *8.

To demonstrate the flaw in the reasoning of the Fourth, Seventh and Eleventh Circuits, Respondent would pose this example. A person is convicted of four murders and is sentenced to four consecutive life sentences for those murders. Under Mississippi law he is required to serve a minimum of ten (10) years on each before he becomes eligible for parole. He could wait until he has served thirty-one (31) years and then bring a habeas challenge to the first two convictions even though the sentences on these convictions had expired. This in inapposite with the rationale of *Peyton* which is based on the need for expeditious adjudication of collateral challenges to state court convictions.

Further expansion of habeas jurisdiction to cover a conviction when the sentence for that conviction has fully

expired prior to the prisoner's filing of a habeas claim would not further the remedial purposes of the writ. Rather, it would encourage and reward delay in the assertion of habeas challenges, contrary to the *Peyton* rationale of speedy judicial disposition.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that this Court affirm the decision below.

Respectfully submitted,

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No. 94-6790

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HARVEY F. GARLOTTE,
Petitioner,

v.

KIRK FORDICE,
Governor of Mississippi,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. A PRISONER SERVING A CONTINUOUS PERIOD OF CONFINEMENT UNDER CONSECUTIVE SENTENCES FOR SEPARATE COUNTS OF CONVICTION REMAINS "IN CUSTODY" UNDER THOSE COUNTS FOR THE AGGREGATE DURATION OF THE SENTENCES	2
II. *MALENG v. COOK* HAS NO APPLICATION WHERE, AS HERE, THE CHALLENGED CONVICTION AND SENTENCE CONTINUE TO CONTROL THE PRISONER'S POTENTIAL RELEASE DATE	8
III. THE PRECLUSIVE JURISDICTIONAL RULE URGED BY RESPONDENT IS INCONSISTENT WITH THE PURPOSES OF THE WRIT	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Ankensbrandt v. Richards, 112 S. Ct. 2206 (1992) .. 3
Armstrong v. State, 618 So. 2d 88 (Miss. 1993) 5
Brecht v. Abrahamson, 113 S. Ct. 1710 (1993) 14
Carafas v. LaVallee, 391 U.S. 234 (1968) 12, 13
Ex Parte Watkins, 3 Pet. (28 U.S.) 193 (1830) 11
Fawcett v. Bablitch, 962 F.2d 617 (7th Cir. 1992) .. 4
Fox v. Kelso, 911 F.2d 563 (11th Cir. 1990) 4
Haines v. Kerner, 404 U.S. 519 (1972) 8
Maleng v. Cook, 490 U.S. 488 (1989) 8, 9, 10, 11
McNally v. Hill, 293 U.S. 131 (1934), *overruled, Peyton v. Rowe*, 391 U.S. 54 (1968) 12
Moore v. Missouri, 159 U.S. 673 (1895) 9
Nichols v. United States, 114 S. Ct. 1921 (1994) 9
O'Neal v. McAninch, No. 93-7407 (U.S. Feb. 21, 1995) 13
Peyton v. Rowe, 391 U.S. 54 (1968) .....*passim*
Post v. Ruth, 354 So. 2d 1111 (Miss. 1978) 6
Railway Co. v. Whitton's Administrator, 13 Wall. (80 U.S.) 270 (1871) 6
Williams v. Puckett, 624 So. 2d 496 (Miss. 1993) .. 6-7

STATUTES

Miss. Code Ann. § 47-5-138(2) 5-6
Miss. Code Ann. § 47-5-139 4
Miss. Code Ann. § 47-5-139(2) 6
Miss. Code Ann. § 47-7-3(1)(c) 4, 7
28 U.S.C. § 2241(c)(3) 2, 3, 7, 10, 12
28 U.S.C. § 2254(d) 4, 13

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REPLY BRIEF

ARGUMENT

Respondent argues that a federal court must forge an artificial separation between consecutive sentences, and must deny jurisdiction under 28 U.S.C. § 2241(c)(3) unless the habeas petitioner establishes that the State is presently crediting the time being served in confinement to the challenged count of conviction. To sustain this position, Respondent ignores not only the logic of the Court's prior decision in *Peyton v. Rowe*, 391 U.S. 54 (1968), but also a wealth of Mississippi authorities establishing that Garlotte's consecutive sentences have been aggregated for all relevant purposes. Moreover, Respondent overlooks the fact that Garlotte's assertedly "expired" three-year sentence remains adjustable by the State, and thus determinative of his potential release date. Re-

spondent's arguments are thus without basis. Because Garlotte remains confined in part under the direct authority of his marijuana conviction and three-year sentence, and because that sentence continues to control his potential release date, Garlotte must be considered "in custody" under § 2241(c)(3) for purposes of the instant challenge.

I. A PRISONER SERVING A CONTINUOUS PERIOD OF CONFINEMENT UNDER CONSECUTIVE SENTENCES FOR SEPARATE COUNTS OF CONVICTION REMAINS "IN CUSTODY" UNDER THOSE COUNTS FOR THE AGGREGATE DURATION OF THE SENTENCES.

Respondent acknowledges the holding of *Peyton v. Rowe*, 391 U.S. 54 (1968), that "a prisoner serving consecutive sentences is '"in custody" under any one of them for purposes of [28 U.S.C.] § 2241(c)(3),'" (Brief for Respondent ("Resp. Br.") at 7 (quoting *Peyton*, 391 U.S. at 67)), but argues that this jurisdictional rule should have no force where the prisoner challenges a consecutive sentence that has technically expired. In addition, Respondent asks the Court to overlook the significant respects in which Mississippi law treats consecutive sentences as a single aggregate sentence for penological purposes. The logic of *Peyton* forecloses Respondent's approach.

According to Respondent, the *Peyton* Court's supposed reliance on the benefits to be derived from early adjudication of habeas claims requires that *Peyton*'s jurisdictional rule be confined to consecutive sentences that have not yet technically expired. (Resp. Br. at 8-15.) Yet while *Peyton* does recognize the benefits of early adjudication of habeas claims, *see Peyton*, 391 U.S. at 62-63, Respondent fails to explain how the Court could have premised a subject-matter jurisdictional holding—neces-

sarily bounded by the text of § 2241(c)(3)[1]—solely on the expedience of encouraging prompt habeas dispositions. No explanation is available. Judicial expedience, however compelling, could not alone have created "custody" in *Peyton* where the relevant statutory text did not support it, nor could expedience have been cited to exempt any class of habeas petitioners from the textual "in custody" requirement altogether.

Instead, while mindful of the wisdom of encouraging prompt collateral review of state criminal proceedings, the *Peyton* Court found "custody" in (and thus jurisdiction over) the entire duration of a prisoner's consecutive sentences in the very character of consecutive terms of confinement. "Practically speaking," the Court explained, a prisoner serving consecutive sentences faces confinement for "the aggregate" of those terms, *Peyton*, 391 U.S. at 64, and therefore should be considered " 'in custody' under any one of [those sentences] for purposes of § 2241(c)(3)," *id.* at 67. Significantly, *Peyton*'s textual construction comfortably embraces not only consecutive sentences not yet served, but also consecutive terms as to which the State contends the prisoner has technically completed service.

As Petitioner has explained, *Peyton*'s jurisdictional holding is firmly grounded in the customary operation of consecutive sentences. (*See* Brief for Petitioner ("Pet. Br.") at 8-14.) Respondent essentially concedes the point, acknowledging that "the earlier of consecutive sentences determines the timing of commencement and expiration of subsequent consecutive sentences." (Resp. Br.

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[1] *See Ankensbrandt v. Richards*, 112 S. Ct. 2206, 2212 (1992) (Congress possesses " 'the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' " (quoting *Cary v. Curtis*, 3 How. (44 U.S.) 236, 245 (1845))).

at 13.) Respondent nevertheless urges that an earlier sentence ceases to control the timing of the prisoner's release from confinement under consecutive sentences—and, presumably, is no longer amenable to adjustment—the moment the earlier sentence has "expired." *Id.*

Respondent cites no authority for this assertion, and for good reason. The cases that address the point assume that where the first of two consecutive sentences is vacated, even after its technical expiration date, the second sentence must run from the date of its imposition. *See Fawcett v. Bablitch*, 962 F.2d 617 (7th Cir. 1992) (consecutive sentences imposed under Wisconsin law); *Fox v. Kelso*, 911 F.2d 563 (11th Cir. 1990) (consecutive sentences imposed under Georgia law); *see also* Pet. Br. at 10 n.5 (citing cases regarding the vacation of consecutive sentences generally). Respondent also fails to explain why the unitary nature of consecutive sentences *should* change on the nominal date on which the first sentence would have expired had it stood alone, as that date works no effect on the character of the prisoner's custody either from the standpoint of the prisoner or the State. For example, with few exceptions, the order in which Mississippi prisoners have been directed to serve consecutive sentences and the lengths of the individual sentences in the consecutive sequence matter not a whit for such purposes as the timing of parole eligibility and the computation of "earned time" and "meritorious earned time" credits.[2] *See* Miss. Code Ann. § 47-5-139; § 47-7-3(1).

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[2] Respondent argues that "state law is not controlling on the issue of jurisdiction under 28 U.S.C. § 2254" (Resp. Br. at 15 (citing *United States v. Bustillos*, 31 F.3d 931 (10th Cir. 1994)), but this Court has made clear that the state law delineating the terms of a habeas petitioner's confinement is keenly relevant to the question whether the petitioner is "in custody" for habeas purposes. Thus, in *Peyton* itself, the Court found it appropriate to regard consecutive sentences as unitary in part because Virginia law treated such sentences as a single aggregate sentence for

Respondent dismisses the actions of the Mississippi Department of Corrections in adjusting Garlotte's three-year marijuana sentence long after its supposed expiration, but those actions compellingly contradict Respondent's core contention. To recall, in 1992 the Department of Corrections made earned-time and meritorious earned time adjustments to the length of Garlotte's three-year marijuana sentence, and credited the time served against his life sentences. These actions in Garlotte's favor took place six years after June 1, 1986, the date on which—according to Respondent's assertions here—Garlotte's three-year sentence "fully expired." (*See* Resp. Br. at 19.) For Respondent, the "easy answer" to this conundrum is that the Department of Corrections simply acted pursuant to a change in the State's law of commutation. (*Id.*) But that explanation simply begs the question of how, in 1992, this change in law could have been applied to redetermine a sentence that supposedly was final and no longer subject to redetermination several years earlier.[3]

What the Mississippi Department of Corrections has retroactively granted, it can take away, and this is the critical point.[4] Notwithstanding Respondent's contention

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purposes of the timing of parole eligibility. *Peyton*, 391 U.S. at 64; *see also id.* at 56 n.3.

[3] Notably, this is not the first time that Respondent has had difficulty identifying to a court the date on which the first of a prisoner's consecutive sentences ends and the next begins. *See Armstrong v. State*, 618 So. 2d 88, 90 (Miss. 1993) ("The inconsistencies in the record . . . do not reflect whether prior to parole Armstrong finished serving the robbery sentence and began to serve the escape sentence."). *Armstrong* provides a handy illustration of the practical difficulties posed by Respondent's proposed rule. Where, as here, a prisoner's nominal discharge date on the first of two consecutive sentences is repeatedly altered by corrections officials, a post-conviction court is faced with a constantly moving target for purposes of determining jurisdiction.

[4] *See* Miss. Code Ann. § 47-5-138(2) ("An inmate may forfeit all or part of his earned time allowance for a serious violation of

that Garlotte "is now in custody on the concurrent life sentences" (Resp. Br. at 20), the Mississippi Department of Corrections is free to re-enlarge Garlotte's marijuana sentence, and potentially lengthen his overall period of imprisonment, for as long as Garlotte remains confined. *See Post v. Ruth*, 354 So. 2d 1111, 1113 (Miss. 1978) ("The earned time does not become vested until the prisoner is entitled to be discharged after receiving credit for good time."); *see also id.* (" 'As a general rule the right to a good-time allowance is contingent until the time arises that its allowance will end imprisonment . . . .' " (quoting *Douglas v. Sigler*, 386 F.2d 684, 686 (8th Cir. 1967))). Respondent's position is thus a curious one: The Mississippi Department of Corrections may still adjust Garlotte's marijuana conviction and sentence and thereby lengthen his term of confinement, but that conviction and sentence—having technically "expired"—are beyond the reach of federal process. Such arguments have traditionally been given a cool reception in the federal courts. *Cf. Railway Co. v. Whitton's Administrator*, 13 Wall. (80 U.S.) 270, 286 (1871) ("Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation.").

In any event, Garlotte's potential release date on his consecutive sentences, the date of greatest significance to the State and to Garlotte alike, is a function of the two sentences' minimum service terms combined.[5] (*See* Pet.

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rules"); *id.* § 47-5-139(2) ("An offender under two . . . or more consecutive sentences shall be allowed commutation based upon the total term of the sentences").

[5] Respondent cites *Williams v. Puckett*, 624 So. 2d 496 (Miss. 1993), for the proposition that "consecutive sentences are treated separately for parole purposes" (Resp. Br. at 18), but other authorities cited by Respondent belie the point. For instance, Miss.

Br. at 17-19.) Thus, should his sentences remain unchanged, when Garlotte becomes eligible for parole after being in prison for ten years and ten months, he will not have technically completed serving the full time associated with either of the sentences imposed on him.[6] The manner in which Garlotte's potential release from his continuous period of confinement is determined exposes the insignificance for purposes of § 2241(c)(3) of a consecutive sentence's technical "expiration" date. As the *Peyton* Court recognized, it is inappropriate to cleave an artificial separation between two consecutive sentences on the basis of their respective contributions to the prisoner's overall term of confinement. Irrespective of the technical status of Garlotte's three-year marijuana sentence as submitted by Respondent, Mississippi law confirms that the

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Code Ann. § 47-7-3(1)(c), set out in its entirety in Respondent's brief, imposes minimum terms of confinement based upon the total length of the prisoner's "sentence *or sentences.*" Miss. Code Ann. § 47-7-3(1)(c) (emphasis added); *see also id.* § 47-7-3(1) (parole eligibility accorded prisoners "who ha[ve] served not less than one-fourth (¼) of *the total of such term or terms* for which such prisoner was sentenced" (emphasis added)). Of course, as Petitioner noted in his opening brief (*see* Pet. Br. at 16-17), *Williams* does require prisoners serving sentences that include statutory minimum periods of incarceration (as do Garlotte's life sentences) to serve each such minimum period specified by law prior to becoming eligible for parole. *Williams*, 624 So. 2d at 498-99. Nevertheless, even in these circumstances, Mississippi law aggregates these service periods to arrive at a single parole eligibility date for the consecutive sentences.

[6] Had the order in which Garlotte was directed to serve his sentences ostensibly been reversed (so that the concurrent life sentences were credited first), Garlott's date of initial parole eligibility would have been the same, even though he would not technically have begun to serve his three-year marijuana sentence. Ironically, had Garlotte been ordered to serve his concurrent life sentences first, there would have been no effect on his actual detention or his initial parole eligibility date, but there would be no question that he could have challenged either of his sentences throughout the duration of his natural life.

marijuana sentence continues to control his potential release date, and thus continues to impose direct restraints on his freedom.

II. *MALENG v. COOK* HAS NO APPLICATION WHERE, AS HERE, THE CHALLENGED CONVICTION AND SENTENCE CONTINUE TO CONTROL THE PRISONER'S POTENTIAL RELEASE DATE.

Respondent argues that *Maleng v. Cook*, 490 U.S. 488 (1989), forecloses federal habeas jurisdiction over Garlotte's marijuana conviction because the continuing postponement of Garlotte's parole eligibility constitutes a mere "collateral consequence" of that conviction. (Resp. Br. at 22-23 (quoting *Garlotte v. Fordice*, 29 F.3d 216, 218 (5th Cir. 1994)).)[7] Respondent's premise is false. Garlotte is currently confined in part under the direct authority of his marijuana conviction and three-year sen-

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[7] Even assuming *arguendo* that Respondent were correct on this point, it does not follow that a federal habeas remedy is unavailable to Garlotte. Respondent overlooks the fact that the *Maleng* Court actually sustained habeas jurisdiction over a prisoner's subsequent confinement as collaterally affected by the prior conviction. That is, under *Maleng*, where the asserted "collateral effect" of an expired conviction is the enlargement or enhancement of a subsequent sentence that remains executory, jurisdiction lies—at the very least—over that subsequent confinement.

Garlotte submits that he remains "in custody" for federal habeas purposes under his marijuana conviction and sentence. Nevertheless, were the Court to conclude that this case should be governed by the principle of *Maleng*, *Maleng* would counsel the construction of Garlotte's *pro se* habeas petition as asserting a challenge to his concurrent life sentences as postponed or delayed by that conviction. *Maleng*, 490 U.S. at 493; *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (filings of *pro se* litigants must be interpreted with deference). Because Garlotte may well have other substantive challenges to the convictions underlying his concurrent life sentences, any remand for this purpose should be structured to permit Garlotte either to supplement his federal habeas petition with additional claims or to withdraw his petition pending the exhaustion of state remedies on such other claims.

tence, and that conviction and sentence continue to control the date of his potential release from confinement. These custodial incidents are not "collateral."

The circumstances that led the *Maleng* Court to conclude that any effects suffered by the prisoner in that case were "collateral" in nature are not remotely present here. The two sentences considered in *Maleng* were not imposed consecutively; the commencement date of the later sentence was in no respect a function of the validity or expiration of the earlier. Rather, in *Maleng* the only continuing disability imposed by the prisoner's expired conviction flowed from his *status* as a felon. Although this status was used as a basis for enhancing the petitioner's second sentence, double jeopardy principles obviously precluded the attribution of any resulting "custody" to his prior, fully-served conviction. *See, e.g., Nichols v. United States*, 114 S. Ct. 1921, 1927 (1994) ("[R]ecidivist statutes . . . do not change the penalty imposed for the earlier conviction."); *Moore v. Missouri*, 159 U.S. 673, 676 (1895) ("The increased severity of the punishment for the subsequent offence is not a punishment for the same offence for the second time, but a severer punishment for the subsequent offence . . . ."). Instead, the *Maleng* petitioner's confinement was properly attributable only to the later conviction and sentence, and only that sentence remained properly subject to federal habeas review. *Maleng*, 490 U.S. at 492-93.

By contrast, where the habeas petitioner has been ordered to serve a continuous period of confinement under consecutive sentences, each of the sentences remains instrumental in determining the petitioner's release date throughout the aggregate duration of the petitioner's confinement. In no sense does one consecutive sentence enlarge or change the character of any other consecutive sentence in the sequence; to the contrary, each sentence discretely specifies the portion of the petitioner's overall confinement that is attributable to each of the underlying

counts of conviction. Yet the symbiotic relationship of consecutive sentences renders the confinement under either subject to the validity of both. In part because of this unique relationship, each underlying conviction remains a basis for the prisoner's confinement until the date of the prisoner's release.[8]

Garlotte's petition is distinguishable from that addressed in *Maleng* in another important respect: fealty to the role of "custody" in delimiting federal habeas jurisdiction. The principal difficulty with the position urged by the prisoner in *Maleng* was its subversion of this congressionally-imposed requirement. *See Maleng*, 490 U.S. at 487. As the Court observed, if the mere "*possibility* that [an expired] conviction will be used to enhance the sentences imposed for any subsequent crimes" established "custody" under 28 U.S.C. § 2241(c)(3), the prevalence of habitual offender and sentence enhancement statutes would mean that "a petitioner whose sentence has completely expired could nonetheless challenge the conviction for which it was imposed at *any time* on federal habeas." *Id.* By contrast, *Peyton*'s rule requiring the aggregation of consecutive sentences presents no such threat to the integrity of Congress's review scheme. The period in which the federal habeas remedy remains available extends not a day beyond the continuous period of confinement imposed by the State.

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[8] Amicus Criminal Justice Legal Foundation ("CJLF") concedes that under the rule adopted by the court below "a person who is guilty of one crime but sentenced for two could serve a somewhat longer sentence than the law prescribes for the second, valid conviction." (Brief for CJLF as Amicus Curiae ("CJLF Br.") at 20.) Nevertheless, CJLF argues that the likelihood that such a valid claim would evade state court review (such as to require correction by a federal court) is so small that the availability of federal habeas review should be confined in such circumstances. (*Id.*) This efficiency-oriented argument is simply a reprise of CJLF's call for the outright abolition of federal habeas corpus—a request that even CJLF admits is properly addressed to Congress rather than this Court. (*See id.* at 6.)

At bottom, *Maleng* turned on the fact that the challenged sentence had "fully expired." *See Maleng*, 490 U.S. at 491. As Garlotte has established, the first of two consecutive sentences does not "fully expire" until the prisoner is released from confinement.

III. THE PRECLUSIVE JURISDICTIONAL RULE URGED BY RESPONDENT IS INCONSISTENT WITH THE PURPOSES OF THE WRIT.

From its inception at common law, the "great object" of the writ of habeas corpus has been the termination of unconstitutional confinement. *See, e.g., Ex Parte Watkins*, 3 Pet. (28 U.S.) 193, 202 (1830) (Marshall, C.J.) ("The writ of *habeas corpus* is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause." (emphasis in original)). The rule urged by Respondent is offensive to this tradition.

Respondent never takes a clear position concerning the effect—under Mississippi law or otherwise—of invalidation of a technically "expired" consecutive sentence on the habeas petitioner's aggregate period of confinement. For Respondent, the question is unimportant. No matter how a prisoner's overall confinement might be adjusted in the event one of his consecutive sentences were invalidated or commuted, Respondent argues that the duration of a prisoner's right to federal habeas review must be measured by the discrete periods that the challenged convictions ostensibly account for in the prisoner's overall confinement, and by the order in which the State considers those convictions discharged. Thus, even if a prisoner serving two consecutive five-year sentences could establish (early in his service of the second term) that the first conviction were constitutionally invalid, thus entitling him to immediate release under the governing state law, Respondent would find federal habeas jurisdiction over the first conviction wanting. So also with Garlotte's petition: Even though invalidation of Garlotte's mari-

juana conviction and sentence would advance the date of Garlotte's initial eligibility for release on parole (a fact not denied by Respondent), Respondent submits that the federal courts are powerless to address the validity of that conviction and sentence.

Respondent's submission ignores that the question of a prisoner's entitlement to release from detention is not simply a sideshow under the federal habeas corpus statute, but rather its core remedial inquiry. The days have long since passed when the writ was extended *only* to those prisoners who could demonstrate a constitutional entitlement to "immediate release" from confinement. *See, e.g., McNally v. Hill*, 293 U.S. 131, 138 (1934), *overruled by Peyton v. Rowe*, 391 U.S. 54 (1968). But at no point has availability of the writ fallen below the low watermark of "immediate release." That is the undeniable effect of the rule Respondent advances. Only if 28 U.S.C. § 2241(c)(3) *required* such a result would it be appropriate to lend judicial sanction to Respondent's interpretation.[9] It does not.

To bolster a jurisdictional rule that is so fundamentally at odds with the tradition of the writ, Respondent attempts to denigrate the rule sought by Garlotte. Respondent's chief contention is that making the writ available to prisoners in Garlotte's circumstances would constitute an "[u]nwarranted [e]xpansion" of federal habeas jurisdiction. (Resp. Br. at 25.) Respondent explains that a rule allowing prisoners serving consecutive sentences to challenge any conviction underlying those sentences "would not deny a federal remedy to one with a constitutional claim to any greater extent than do procedural bars." (*Id.* at 25-26.) Respondent is correct to this extent: A rule foreclosing habeas jurisdic-

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[9] *See Carafas v. LaVallee*, 391 U.S. 234, 240 (1968) (interpretation of § 2241(c)(3) under which jurisdiction over properly instituted habeas proceeding would be defeated upon petitioner's release from custody rejected in part because "[t]he federal habeas corpus statute does not require [such a] result").

tion over technically "expired" consecutive sentences would, indeed, work like a "procedural bar." But unlike a procedural bar, Respondent's suggested approach would deprive prisoners of federal review, and potentially foreclose opportunities for immediate release, without ascribing any fault to the prisoners in terms of their elections or omissions under the State's procedural rules. For instance, a prisoner ordered to serve consecutive two-year and fifty-year sentences would—in the event exhaustion of the State's post-conviction remedies took more than two years to complete—be without a federal remedy under Respondent's regime (with respect to the two-year sentence), even though the delays in the exhaustion process were not of the prisoner's making. After *Carafas*, at least, such an interpretation of the habeas statute that consigns prisoners "to serious disabilities because of the law's complexities and not because of [their] fault" is to be avoided if at all possible. *Carafas*, 391 U.S. at 239.

Without supporting the point, Respondent adds that a rule recognizing jurisdiction over Garlotte's petition would "encourage and reward delay in the assertion of habeas challenges." (Resp. Br. at 28.) This is wrong. A prisoner serving a continuous period of confinement under consecutive sentences is no more likely to favor a delay in bringing challenges to the convictions underlying his sentences than a prisoner serving a single sentence (or concurrent sentences) of equivalent overall length. For each such prisoner, an additional day's delay in bringing a constitutional challenge is an additional day in assertedly unlawful confinement. And because it is the petitioner who generally must bear the burden of proof in a habeas proceeding, *see* 28 U.S.C. § 2254(d) (applicant "shall establish" that state court proceeding was flawed),[10] any delay in seeking the writ will dispropor-

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[10] *Compare, e.g., O'Neal v. McAninch*, No. 93-7407, slip op. (U.S. Feb. 21, 1995) (habeas petitioner held entitled to relief where district court harbors "grave doubt" concerning whether constitu-

tionately impair the petitioner's ability to establish the essential factual prerequisites for his constitutional claim. *Cf. Peyon*, 391 U.S. at 62 ("Postponement of the adjudication of [habeas] issues for years can harm both the prisoner and the State").

The benefits of prompt initiation and completion of federal collateral review proceedings are undeniable; *Peyton* itself champions those benefits. *See id.* at 62-63. Nevertheless, the fact remains that Congress elected to permit those subject to allegedly unconstitutional confinement—even those subject to life imprisonment—to seek the writ of habeas corpus at any point during that confinement. Recognizing jurisdiction over Garlotte's consecutive sentences, as aggregated, is consistent with Congress's election.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals for the Fifth Circuit should be reversed and the cause remanded to that court for consideration of Garlotte's claims on the merits.

Respectfully submitted,

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April 11, 1995

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tional error affected verdict) *with, e.g., Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993) ("[H]abeas petitioners . . . are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'").

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HARVEY F. GARLOTTE,
Petitioner

v.

KIRK FORDICE,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICI POST-CONVICTION ASSISTANCE PROJECT OF THE UNIVERSITY OF VIRGINIA AND NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Interest of Amici Curiae 1
Summary of Argument 3
Argument:

I. PETITIONER IS CURRENTLY IN CUSTODY UNDER THE AGGREGATE OF CONSECUTIVE SENTENCES IMPOSED BY THE TRIAL COURT 5

II. EVEN IF PETITIONER IS NOT IN CUSTODY FOR THE FIRST SENTENCE, HE IS IN CUSTODY FOR THE SECOND SET OF CONSECUTIVE SENTENCES AND CAN CHALLENGE THE VALIDITY OF THE FIRST SENTENCE BECAUSE HE WILL RECEIVE CREDIT ON THE SECOND SENTENCES IF THE FIRST IS INVALIDATED 14

Conclusion 17

TABLE OF AUTHORITIES

Federal Cases **Page**

Bernard v. Garraghty, 934 F.2d 52 (4th Cir. 1991) 2, 7, 9, 12
Blitz v. United States, 153 U.S. 308 (1894) 4, 16
Clark v. Pennsylvania, 892 F.2d 1142 (3d Cir. 1989) 15
Crank v. Duckworth, 905 F.2d 1090 (7th Cir. 1990), cert. denied, 498 U.S. 1040 (1991) 15
Fawcett v. Bablitch, 962 F.2d 617 (7th Cir. 1992) 12
Feldman v. Perrill, 902 F.2d 1445 (9th Cir. 1990) 15
Fox v. Kelso, 911 F.2d 563 (11th Cir. 1990) 12, 16
Gamble v. Parsons, 898 F.2d 117 (10th Cir. 1990), cert. denied, 498 U.S. 879 (1990) 15
Garlotte v. Fordice, 29 F.3d 216 (5th Cir. 1994) . . 11, 16
Goodwin v. Page, 418 F.2d 867 (10th Cir. 1969) 16
Hensley v. Municipal Court, 411 U.S. 345 (1973) 5
Johnson v. Henderson, 455 F.2d 983 (5th Cir. 1972) 4, 16
Jones v. Cunningham, 371 U.S. 236 (1963) 3, 5, 9, 11, 12
Maleng v. Cook, 490 U.S. 488 (1989) 3, 4, 11, 12, 14, 15
McCleskey v. Zant, 499 U.S. 467 (1991) 13
McNally v. Hill, 293 U.S. 131, 136 (1934) 5
Peyton v. Rowe, 391 U.S. 54 (1968) 3, 5, 6, 7, 8, 9, 10, 11, 12

TABLE OF AUTHORITIES (CONTINUED)

Federal Cases (continued) **Page**

Rose v. Lundy, 455 U.S. 509 (1982) 15
United States v. Baez, 732 F.2d 780 (10th Cir. 1984) 16
Willis v. Collins, 989 F.2d 187 (5th Cir. 1993) 15

State Cases

Armstrong v. State, 618 So. 2d 88 (Miss. 1993) 10
Jackson v. Jones, 254 Ga. 127, 327 S.E.2d 206 (1985) 16
Milam v. State, 578 So. 2d 272 (Miss. 1991) 7
Williams v. Puckett, 624 So. 2d 496 (Miss. 1993) 7

Statutes and Rules

18 U.S.C. § 3568 (repealed 1984) (current version at 18 U.S.C. 3585 (1988) 16
28 U.S.C. § 2254 (1988) 5, 13, 15
28 U.S.C. § 2241 (1988) 5, 15
Miss. Code Ann. § 47-7-3 (Supp. 1994) 3, 7, 8, 10
Miss. Code Ann. § 47-5-139(2) (Supp. 1994) 3, 8
Rule 9 (a), Rules Governing @ 2254 Cases 13

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INTEREST OF AMICI CURIAE

Letters of consent from both parties are on file in the office of the Clerk of the Court.

The Post-Conviction Assistance Project (P-CAP) is a Virginia nonprofit corporation organized and staffed by student volunteers at the University of Virginia School of

Law. Since its establishment in 1971, P-CAP has advocated respect for the rights of those confined to our nation's prisons. P-CAP members answer inquiries and requests for legal assistance from *pro se* litigants, interview arrestees in preparation for bail hearings, and represent prisoners, under third-year practice rules, in federal habeas corpus and civil rights suits.

P-CAP's interest as *amicus curiae* arises from its experience working with inmates and responding to requests for help from *pro se* litigants. In 1991, before the United States Court of Appeals for the Fourth Circuit, P-CAP successfully argued a case factually similar to the present case in Bernard v. Garraghty, 934 F.2d 52, in which the court adopted a definition of "in custody" similar to the one advocated by Mr. Garlotte, but rejected by the Fifth Circuit. The concern of *amicus curiae* is ensure one full and fair opportunity for *pro se* litigants to raise their claims in federal court by promoting a more coherent and uniform application of laws governing habeas corpus litigation.

The National Legal Aid and Defender Association (NLADA) is a private, non-profit national membership organization headquartered in Washington, D.C. which serves as a collective voice for both civil legal services and indigent defense services throughout the nation. For more than eighty years, NLADA has worked to expand and improve the quality of legal services for all persons unable to retain counsel. Each year, NLADA responds to thousands of requests for assistance from prison and jail inmates around the country.

SUMMARY OF ARGUMENT

I. The court of appeals erred because Mr. Garlotte is "in custody" pursuant to the first conviction for several reasons. First, as this Court held in Peyton v. Rowe, 391 U.S. 54, 64 (1968), custody "comprehends [the habeas petitioners'] status for the entire duration of their imprisonment [under consecutive sentences]." Irrespective of whether a petitioner is challenging a consecutive sentence he has nominally completed or has yet to start, consecutive sentences constitute the functional equivalent of one extended sentence. To the petitioner, it is only a matter of administrative convenience which sentence he serves first, and often the second sentence is served for conduct preceding that giving rise to the first sentence. Additionally, the state treats consecutive sentences as one aggregate sentence for purposes of parole eligibility, Miss. Code Ann. § 47-7-3(1) (Supp. 1994), and commutation of sentences for meritorious earned time credits. Miss. Code Ann. § 47-5-139(2) (Supp. 1994). No substantial state interest turns on which sentence is served first.

Moreover, Mr. Garlotte's first sentence has not fully expired, because he has six months left on that sentence which he must eventually serve either in prison or on parole. The future parole or prison time that Mr. Garlotte must serve attributable to the initial sentence plainly satisfies the custody requirement. Jones v. Cunningham, 371 U.S. 236 (1963). The conclusion of custody is entirely consistent with this Court's decision in Maleng v. Cook, 490 U.S. 488 (1989), because Mr.

Garlotte in this case asserts he is in custody, not because of any collateral consequences, but because of the current and future restraints imposed by Mississippi for that conviction.

II. Finally, even if Mr. Garlotte were not in custody for the first conviction, he is unquestionably in custody for the second set of sentences. As this Court held in Maleng, a petitioner satisfies the custody requirement by challenging a current conviction as enhanced by one that has previously expired. 490 U.S. at 493. Here, the relationship between the prior and current convictions is more palpable: if Mr. Garlotte's first conviction is invalidated, the state will credit his current sentences with the time he served for the first, invalid conviction. See Johnson v. Henderson, 455 F.2d 983 (5th Cir. 1972); See also Blitz v. United States, 153 U.S. 306 (1894). Thus, Mr. Garlotte is not only in custody for the current sentences, but he can challenge the merits of the first sentence because, if successful, the state will credit those sentences with time previously served on the invalidated conviction.

ARGUMENT

I.

PETITIONER IS CURRENTLY IN CUSTODY UNDER THE AGGREGATE OF CONSECUTIVE SENTENCES IMPOSED BY THE TRIAL COURT

The habeas corpus statutes, 28 U.S.C. § 2254 (1988), 28 U.S.C. § 2241(c)(3) (1988), provide for the issuance of writs on behalf of persons "in custody." Although the statute does not define "custody," this Court has construed the term in a flexible manner, concluding for instance that a parolee was in custody by examining the "restraints [on the petitioner] not shared by the public generally." Jones v. Cunningham, 371 U.S. 236, 240 (1963). See also Hensley v. Municipal Court, 411 U.S. 345, 348-52 (1973) (petitioner released after conviction on own recognizance satisfied custody requirement). More generally, this Court has explained that "custody" must be understood by "recourse . . . to the common law. . . and to the decisions of the Court interpreting and applying the common law principles." Peyton v. Rowe, 391 U.S. 54, 59 (1968) (quoting McNally v. Hill, 293 U.S. 131, 136 (1934)).

In elaborating upon that meaning of "custody," this Court has previously determined that prisoners may challenge the second of two consecutive sentences as long as they are incarcerated "under the aggregate of consecutive sentences imposed on them." Peyton, 391 U.S. at 64. In other words, "in common understanding 'custody' comprehends [the habeas petitioners'] status for

the entire duration of their imprisonment [under consecutive sentences]." Id. That reasoning applies as well to the instant case in which Mr. Garlotte seeks to challenge the first of two consecutive sentences even if, by the time he had exhausted his state remedies, the first sentence had nominally expired.[1]

Mr. Garlotte must be considered in custody for the first consecutive sentence for two related reasons. First, from the perspective of both inmates and state officials, consecutive sentences constitute the functional equivalent of one extended sentence, and Mr. Garlotte therefore remains in custody on all consecutive sentences during the aggregate term of imprisonment.

From the vantage point of the offender, it is immaterial which consecutive sentence is nominally served first. Prisoners care about their full term of confinement, and are only interested in curtailing their incarceration when possible. They will likely challenge both consecutive sentences as early as possible during their term of confinement.

With respect to the state's administrative interests, the key determinant is the total term of confinement, and

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[1]This Court held in Peyton that a habeas petitioner could challenge the second of two consecutive sentences even while he or she is technically in custody under the first sentence. This Court noted that both the habeas petitioner and the state might otherwise be prejudiced by the delay, since witnesses and evidence might become harder to locate with the passage of time. Id. at 62-63. Nonetheless, the Court did not hold such evidentiary concerns dispositive, and as we suggest infra at page 13, permitting suit in this context would not foster delay.

not the duration of the individual component sentences. For instance, in Mississippi, parole is determined by the total term of confinement, not by each individual sentence. As is the case with the Virginia law examined in Peyton,[2] Mississippi provides that parole must be ascertained under the terms of the combined sentences:

> Every prisoner who has been or may hereafter be convicted of any offense against the State of Mississippi, and is confined in the execution of a judgment of such conviction in the Mississippi State Penitentiary for a definite term or terms of one (1) year or over . . . who has served not less than one-fourth (1/4) of the total of such term or terms for which such prisoner was sentenced, or, if sentenced to serve a term or terms of thirty (30) years or more, or if sentenced for the term of the natural life of such prisoner, has served not less than ten (10) years of such life sentence, may be released on parole."

Miss. Code Ann. § 47-7-3(1).[3] Mississippi bases parole

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[2]See also Bernard v. Garraghty, 934 F.2d 52 (4th Cir. 1991).

[3]If one of the consecutive sentences precludes parole, however, or permits parole under more restrictive circumstances, then such restrictions must be considered in calculating parole eligibility for the combined sentences. See, e.g., Williams v. Puckett, 624 So. 2d 496 (Miss. 1993). See also Milam v. State, 578 So. 2d 272 (Miss. 1991) (addressing exceptional circumstance when one of the

determinations upon the total of all consecutive sentences. Parole eligibility under Section 47-7-3 would often be different if each crime were treated separately. For instance, assume two consecutive sentences of sixteen years each. If computed separately, an inmate would be eligible for parole after serving four years in prison on each, or eight years if taken together. But under the statute, parole eligibility would not exist until the prisoner had served ten years. See also Miss. Code Ann. § 47-7-3(1)(c) ("No one shall be eligible for parole until he shall have served . . . ten (10) months of his sentence or sentences when his sentence or sentences is more than two (2) years but no more than five (5) years") (emphasis added). As in Peyton, therefore, "[p]ractially speaking, [the petitioner] is in custody for 50 years, or for the aggregate of his 30 and 20-year sentences. For purposes of parole eligibility . . . he is incarcerated for 50 years." Peyton, 391 U.S. at 64.

Similarly, Mississippi treats consecutive sentences as one total term for commutation of the sentences for meritorious earned-time credit. Section 47-5-139(2) of the Mississippi Code provides that "[a]n offender under two (2) or more consecutive sentences shall be allowed commutation [for earned time] based upon the total term of the sentences."

Thus, no sound penological justification dictates which consecutive sentence an offender nominally serves first. Chronologically, the second of two consecutive

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component sentences limits amount of good time credit attainable). But the order in which the sentences are served remains of no consequence.

sentences may be imposed for convictions that preceded convictions underlying the first sentence, and the acts giving rise to the second conviction may have occurred before those giving rise to the first.[4] Of course, the state may prefer to designate the shorter of the two consecutive sentences first to forestall collateral review, but that cannot be considered penologically legitimate. Thus, because consecutive sentences are functionally equivalent to one total sentence from the perspective of both the inmate and the state, an inmate is in custody for all consecutive sentences during the entire term of confinement. Permitting suit would minimize the role of caprice in the habeas system.

Second, Mr. Garlotte is in custody because Mississippi has yet to discharge him fully from the marijuana conviction. Part of the parole Mr. Garlotte may serve at the end of the consecutive sentences is attributable to the first sentence. The possibility of parole demonstrates continuing state constraint relating to the first sentence. This Court has held that inmates are in custody not only when they are behind prison walls, but also when they are on parole. Jones v. Cunningham, 371 U.S. 236 (1963). Prisoners on parole must typically obey special rules imposing reporting requirements, limiting the parolees' geographic mobility, circumscribing whom they can associate with, and requiring periodic drug tests. Indeed, any transgression may result in a return to the

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[4]In Bernard v. Garraghty, 934 F.2d 52 (4th Cir. 1991), for instance, the second conviction arose from conduct occurring before that underlying the first conviction.

prison itself. Such constraints plainly suffice to constitute custody.

In this case, Mr. Garlotte started serving his first sentence on May 31, 1985. (Petition for Certiorari at Appendix V). His discharge date for the first sentence was one year later, on June 1, 1986. Id. The Mississippi Department of Corrections provides that, hypothetically for the first conviction alone, Mr. Garlotte's parole eligibility date would have been December 2, 1985. Id. Because Mississippi law requires a mandatory minimum of ten years incarceration for a natural life term, Miss. Code Ann. § 47-7-3(1), the Department of Corrections added ten years to Mr. Garlotte's parole eligibility date of December 2, 1985, and provided the current date of December 2, 1995. (See Petition for Certiorari at Appendix V).

According to the Department of Corrections, Mr. Garlotte's murder convictions began on December 2, 1985. Id. As of December 2, 1995, his first parole eligibility date, Mr. Garlotte will have served six months on his one-year marijuana conviction, and ten years on his concurrent sentences for murder. Mr. Garlotte thus still has six months to serve either on parole or in prison which is directly attributable to his first sentence.[5] Whether served on parole or in prison, that six-month period satisfies the custody requirement under the habeas statutes. As in Peyton, Mr. Garlotte must be allowed to challenge a conviction for which he will be in custody under consecutive sentences.

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[5]Cf. Armstrong v. State, 618 So. 2d 88 (Miss. 1993) (offender released on parole on same day for two consecutive sentences).

Moreover, continuing custody can be demonstrated by considering what Mississippi would do if an inmate's second sentence were invalidated immediately after the first of consecutive sentences nominally expired. We doubt that Mississippi would release an inmate in that situation;[6] rather, Mississippi would presumably release the inmate on parole for the first sentence, and any violation of parole would force his return to custody. Thus, because Mr. Garlotte has yet to serve parole attributable to his first conviction, he must still be considered in custody for that conviction.

Although the court below noted that Mr. Garlotte's parole has been "delayed" by the first conviction, 29 F.3d at 218, it failed to recognize that the parole itself will be attributable to both sentences. Cf. Peyton, 391 U.S. at 64. The court therefore concluded, in reliance on this Court's decision in Maleng v. Cook, 490 U.S. 488 (1989), that delayed parole is a mere collateral consequence of the first conviction and insufficient to satisfy the custody requirement. But once it becomes clear that the parole is attributable to the first sentence, then Maleng is no longer controlling, and the court's conclusion flatly contradicts this Court's holding in Jones v. Cunningham that a prisoner on parole is in custody.

In Maleng, this Court held that a habeas petitioner could not challenge a sentence in one jurisdiction that had already expired when he was in custody in a different jurisdiction on unrelated charges. The only collateral effect remaining was the possibility of enhanced

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[6]Mississippi, however, would credit the first sentence for time served on the second.

subsequent punishments due to operation of recidivist statutes. This Court explained that "collateral consequences . . . are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." 490 U.S. at 492. Exclusive reliance on collateral consequences to establish jurisdiction "stretche[d] the language 'in custody' too far." Id. at 491. However, the question before the Court in this case is not one of collateral consequences, but rather whether Mr. Garlotte is still in custody on the marijuana conviction because he remains incarcerated under the aggregate sentences, and may yet earn parole directly attributable to the marijuana conviction. The Maleng decision never addressed the unique status of consecutive sentences, never disputed that a prisoner on parole is in custody, and never signalled a retreat from either Peyton or Jones v. Cunningham.

Moreover, other courts of appeals have construed Maleng to comport with this Court's decisions in Peyton and Jones v. Cunningham. In Bernard v. Garraghty, 934 F.2d 52 (4th Cir. 1991), and in Fawcett v. Bablitch, 962 F.2d 617, 618 (7th Cir. 1992), the courts of appeals held that a prisoner serving consecutive sentences is "in custody" under any one of the two sentences for purposes of the habeas statutes. And in Fox v. Kelso, 911 F.2d 563, 568 (11th Cir. 1990), the court of appeals concluded that Maleng did not apply where the offender would receive credit against his current sentence if he successfully challenged the first consecutive sentence that had already technically expired.

Finally, permitting suit would in no way clog the federal courts. Prisoners serving consecutive sentences

have every incentive to file petitions at the earliest practicable moment. Indeed, in this case, Mr. Garlotte filed a habeas petition in state court, but due to the delay inherent in the process, was not able to file a petition in federal court before his conviction for the marijuana charge nominally expired.[7] There is no reason to suspect delay or any strategic manipulation on the part of prisoners, and if manipulation is attempted, this Court (or lower courts) can easily redress such instances of abuse as they arise. See Rule 9(a) Governing Section 2254 Cases in the United States District Courts. Thus, it will be the rare case in which a prisoner challenges the first of two consecutive sentences after the first sentence has nominally run its course.

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[7]The court of appeals' rule would in fact pressure offenders serving consecutive sentences into filing premature federal petitions for fear of losing the federal forum. This Court has repeatedly stressed, however, that inmates should not abuse the writ but rather should "exercise [] reasonable care and diligence" to marshal all conceivable arguments in one coherent effort. McCleskey v. Zant, 499 U.S. 467 (1991). Recognizing that inmates remain in custody throughout both legs of consecutive sentences furthers this Court's interest in encouraging prisoners to file only considered, plausible petitions.

II.

EVEN IF PETITIONER IS NOT IN CUSTODY FOR THE FIRST SENTENCE, HE IS IN CUSTODY FOR THE SECOND SET OF CONSECUTIVE SENTENCES AND CAN CHALLENGE THE VALIDITY OF THE FIRST SENTENCE BECAUSE HE WILL RECEIVE CREDIT ON THE SECOND SENTENCES IF THE FIRST IS INVALIDATED

In Maleng, this Court construed the offender's challenge to an expired sentence as a challenge to a subsequent sentence, for which he was in custody, as enhanced by the prior conviction. Although the Court decided the jurisdictional issue in petitioner's favor, it left open the question whether the lower courts on remand should reach the merits of petitioner's challenge to the expired conviction: "We express no view on the extent to which the [expired] conviction itself may be subject to challenge in the attack upon the 1978 sentences it was used to enhance." 490 U.S. at 494.

In this case as well, the Court should read the petition as challenging the murder convictions because, if the marijuana conviction is overturned, Mr. Garlotte would be credited with the amount of time already served on the marijuana conviction.[8] Whether the duration of a sentence is enhanced or extended because of a prior conviction is immaterial for purposes of the custody determination. The court of appeals inexplicably declined to follow this Court's path in Maleng, refusing to construe

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[8]See infra page 16.

the petition to challenge the second set of consecutive sentences. Thus, Mr. Garlotte satisfies the jurisdictional custody requirements of 28 U.S.C. §§ 2241 and 2254.[9]

As in Maleng, this Court need not resolve the extent to which Mr. Garlotte may challenge the merits of the marijuana conviction on the ground that, but for the conviction, he would be released earlier from prison on the sentences imposed consecutively to that conviction. Numerous lower courts, however, in applying Maleng have reached the merits of such challenges in analogous contexts. For instance, the courts of appeals in Gamble v. Parsons, 898 F.2d 117 (10th Cir. 1990), cert. denied, 498 U.S. 879 (1990); Clark v. Pennsylvania, 892 F.2d 1142 (3d Cir. 1989); Feldman v. Perrill, 902 F.2d 1445 (9th Cir. 1990); and Crank v. Duckworth, 905 F.2d 1090 (7th Cir. 1990), cert. denied, 498 U.S. 1040 (1991), addressed the merits of challenges to prior convictions by reformulating the petitions to attack subsequent sentences as enhanced by the original convictions. Indeed, the Fifth Circuit has followed suit. Willis v. Collins, 989 F.2d 187 (5th Cir. 1993).

To resolve the instant case, this Court need not travel that route. The challenge in this case turns not on enhancement of a current sentence, but rather on receiving automatic credit for time previously served. In the context of consecutive sentences, as in the context of a second sentence for the same acts after an initial

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[9]On remand, Mr. Garlotte should be afforded the opportunity to press his challenge to the murder convictions together with any other claims for which he has exhausted his state remedies. Cf. Rose v. Lundy, 455 U.S. 509 (1982).

conviction has been overturned,[10] the offender receives credit for time served on the first sentence if it is invalidated. See, e.g., Goodwin v. Page, 418 F.2d 867, 868 (10th Cir. 1969); Johnson v. Henderson, 455 F.2d 983, 984 (5th Cir. 1972); Jackson v. Jones, 327 S.E.2d 206, 254 Ga. 127 (1985). Indeed, the court below implicitly so held in this case, finding that, if the first conviction were overturned, Mr. Garlotte would be eligible for parole earlier. 29 F.3d at 218. In light of that nexus between consecutive sentences, the court of appeals in Fox v. Kelso, 911 F.2d 563 (11th Cir. 1990), held that federal courts should review the merits of a challenge to the first of consecutive sentences even when it has expired, as long as the petitioner would receive credit on his current sentence if the prior sentence were invalidated. Thus, in this case as well, because of the symbiotic relationship between consecutive sentences, Mr. Garlotte should be able to challenge the merits of the first consecutive sentence as long as the duration of the second set of consecutive sentences hinges directly on the validity of the first.

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[10]See, e.g., Blitz v. United States, 153 U.S. 308 (1894) (ordering that offender must receive credit for time already served on related charge that was invalidated); United States v. Baez, 732 F.2d 780 (10th Cir. 1984) (same, construing 18 U.S.C. § 3568 (repealed 1984) (current version at 18 U.S.C. § 3585 (1988))).

CONCLUSION

For the foregoing reasons, we respectfully request the Court to reverse the court's decision below and hold that Mr. Garlotte is in custody for purposes of challenging the first consecutive sentence.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HARVEY F. GARLOTTE,

Petitioner,

vs.

KIRK FORDICE,
Governor of Mississippi,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does a federal court in habeas corpus have jurisdiction to consider challenges to the first of two consecutive sentences, when the petition is filed after the time of the first sentence has expired?

TABLE OF CONTENTS

Question presented i

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 2

Argument 3

I

Garlotte has already had his day in court; the question is whether the state must endure another one 3

A. The cost of relitigation 4

B. Finality and habeas corpus 6

II

The *Peyton-Hensley* line of cases ran roughshod over earlier precedent and should not be extended 9

A. The traditional view 9

B. The expansive view 13

C. Reassertion of limits 17

III

No federal interest in this case outweighs the federalism and finality concerns 18

Conclusion 21

TABLE OF AUTHORITIES

Cases

Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U. S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970) 14

Baker v. Grice, 169 U. S. 284, 42 L. Ed. 748, 18 S. Ct. 323 (1898) 16

Boykin v. Alabama, 395 U. S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969) 4, 14

Braden v. 30th Judicial Circuit Court, 410 U. S. 484, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (1973) 7

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953) 6

Butler v. McKellar, 494 U. S. 407, 108 L. Ed. 2d 347, 110 S. Ct. 1212 (1990) 21

Carafas v. La Vallee, 391 U. S. 234, 20 L. Ed. 2d 554, 88 S. Ct. 1556 (1968) 3, 15

Coleman v. Thompson, 501 U. S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) 17

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U. S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977) 16

Custis v. United States, 128 L. Ed. 2d 517, 114 S. Ct. 1732 (1994) 18

Douglas v. California, 372 U. S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963) 12

Dunn v. Simmons, 877 F. 2d 1275 (CA6 1989) 18, 21

Ex parte Baez, 177 U. S. 378, 44 L. Ed. 813, 20 S. Ct. 673 (1900) 10

Ex parte Hawk, 321 U. S. 114, 88 L. Ed. 572, 64 S. Ct. 448 (1944) 16

Ex parte Hull, 312 U. S. 546, 85 L. Ed. 1034,
61 S. Ct. 640 (1941) 12, 14

Ex parte McCready, 15 F. Cas. 1345
(CCED Va. 1874) 10

Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868,
6 S. Ct. 734 (1886) 16

Ex parte Watkins, 3 Pet. (28 U. S.) 193,
7 L. Ed. 650 (1830) 6

Ex parte Watkins, 7 Pet. (32 U. S.) 568,
8 L. Ed. 786 (1833) 6

Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837,
83 S. Ct. 822 (1963) 14

Garlotte v. Fordice, 29 F. 3d 216 (CA5 1994) 2

Garlotte v. State, 530 So. 2d 693 (Miss. 1988) 2, 3, 5

Gideon v. Wainwright, 372 U. S. 335, 9 L. Ed. 2d 799,
83 S. Ct. 792 (1963) 12

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76 S. Ct. 585 (1956) 12

Hensley v. Municipal Court, 411 U. S. 345,
36 L. Ed. 2d 294, 93 S. Ct. 1571 (1973) 8, 16, 17

Johnson v. Hoy, 227 U. S. 245, 57 L. Ed. 497,
33 S. Ct. 240 (1913) 11, 16

Jones v. Cunningham, 371 U. S. 236, 9 L. Ed. 2d 285,
83 S. Ct. 373 (1963) 9, 13

Lehman v. Lycoming County Children's Services,
458 U. S. 502, 73 L. Ed. 2d 928,
102 S. Ct. 3231 (1982) 17, 18

Lillios v. New Hampshire, 788 F. 2d 60 (CA1 1986) 7

Maleng v. Cook, 490 U. S. 488, 104 L. Ed. 2d 540,
109 S. Ct. 1923 (1989) 7, 17, 18

Matter of Moran, 203 U. S. 96, 51 L. Ed. 105,
27 S. Ct. 25 (1906) 6

McCready v. Commonwealth, 27 Gratt. (68 Va.) 985
(1876) 10

McCready v. Virginia, 94 U. S. 391,
24 L. Ed. 248 (1877) 10

McFarland v. Scott, 129 L. Ed. 2d 666,
114 S. Ct. 2568 (1994) 14

McNally v. Hill, 293 U. S. 131, 79 L. Ed. 238,
55 S. Ct. 24 (1934) 11, 12

O'Neal v. McAninch, No. 93-7407
(U. S., Feb. 21, 1995) 19

Parke v. Raley, 121 L. Ed. 2d 391,
113 S. Ct. 517 (1992) 14, 18

Parker v. Ellis, 362 U. S. 574, 4 L. Ed. 2d 963,
80 S. Ct. 909 (1960) 12

Peyton v. Rowe, 391 U. S. 54, 20 L. Ed. 2d 426,
88 S. Ct. 1549 (1968) 13, 14

Re Lincoln, 202 U. S. 178, 50 L. Ed. 984,
26 S. Ct. 602 (1906) 11

Re Medley, 134 U. S. 160, 33 L. Ed. 835,
10 S. Ct. 384 (1890) 10

Re Swan, 150 U. S. 637, 37 L. Ed. 1207,
14 S. Ct. 225 (1893) 11

Reed v. Farley, 129 L. Ed. 2d 277,
114 S. Ct. 2291 (1994) 7, 13

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 20

Schlup v. Delo, No. 93-7901 (U. S., Jan. 23, 1995) 20

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81 S. Ct. 679 (1961) 13

Stallings v. Splain, 253 U. S. 339, 64 L. Ed. 940,
40 S. Ct. 537 (1920) 11, 16

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96 S. Ct. 3037 (1976) 6

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104 S. Ct. 2052 (1984) 5

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67 S. Ct. 1588 (1947) 13

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18 S. Ct. 805 (1898) 11, 14

United States v. Moreland, 258 U. S. 433, 66 L. Ed. 700,
42 S. Ct. 368 (1922) 16

United States v. Morgan, 346 U. S. 502, 98 L. Ed. 248,
74 S. Ct. 247 (1954) 15

Urquhart v. Brown, 205 U. S. 179, 51 L. Ed. 760,
27 S. Ct. 459 (1907) 8

Vasquez v. Hillery, 474 U. S. 254, 88 L. Ed. 2d 598,
106 S. Ct. 617 (1986) 16, 20

Wales v. Whitney, 114 U. S. 564, 29 L. Ed. 277,
5 S. Ct. 1050 (1885) 10, 11, 15, 16

Webster v. Fall, 266 U. S. 507, 69 L. Ed. 411,
45 S. Ct. 148 (1925) 10

Wright v. West, 120 L. Ed. 2d 225,
112 S. Ct. 2482 (1992) 6

Statutes

Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 8

28 U. S. C. § 1332 7

28 U. S. C. § 2255 15

Rules of Court

Rules Governing Section 2254 Cases in the United States District Courts, Rule 1 7

Rule 4 4

Treatise

R. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus (2d ed. 1876) 15

Miscellaneous

Advisory Committee Note to 28 U. S. C. § 2254 Rule 4 . . . 4

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HARVEY F. GARLOTTE,

Petitioner,

vs.

KIRK FORDICE,
Governor of Mississippi,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the relitigation of claims, already considered in the state court, by a person who is legally in prison on other charges. Such unnecessary relitigation is contrary to the rights of society which CJLF was formed to advance.

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1. Both parties have given written consent to the filing of this brief.

SUMMARY OF FACTS AND CASE

In 1985, petitioner Garlotte pleaded guilty to possession of marijuana. The same day he pleaded guilty to two counts of murder. He was sentenced to three years in prison on the marijuana charge and life in prison for the murders, to be served consecutively in that order. Pet. for Cert. 3-4; Brief in Opposition 2. Approximately a year later, he filed a motion for state post-conviction relief, which was denied. Pet. for Cert. 4-5. He appealed the denial to the Mississippi Supreme Court, which affirmed in a published opinion. *Garlotte* v. *State*, 530 So. 2d 693 (1988).

Garlotte then waited another year before filing his federal habeas petition. He says he was too busy litigating his murder convictions and conditions of confinement to pursue the matter promptly. Pet. for Cert. 5. The District Court denied relief on the merits. *Id.*, App. B, C, D. Circuit Judge Duhé granted a certificate of probable cause and directed briefing on the question of whether Garlotte's allegations of involuntary plea and ineffective assistance of counsel could be dismissed without requiring the state to file and without an evidentiary hearing. *Id.*, at App. G.

On the appeal, the state noted for the first time that the marijuana conviction had expired before the habeas petition was filed. *Garlotte* v. *Fordice*, 29 F. 3d 216, 217 (CA5 1994) (*per curiam*). The Court of Appeals affirmed the order of dismissal on the ground of lack of jurisdiction. *Id.*, at 218.

SUMMARY OF ARGUMENT

The question in this case is not whether petitioner should be given a day in court, but whether we should spend the resources to give him a *third* when he has already had two. Such extensive relitigation may arguably be justified when the continued, wrongful incarceration of an innocent man is a possibility, but that risk is not present here. Garlotte is properly in prison on two convictions of murder not challenged here. The extremely speculative possibility that he might be paroled a few months earlier if the marijuana conviction is overturned is insufficient to justify the cost of relitigation.

Petitioner's reliance on the tradition of habeas corpus is misplaced. The true tradition weighs heavily against his position. Habeas corpus was traditionally a remedy exclusively for people held in custody illegally and entitled to immediate release. The cases petitioner relies on come from a narrow slice of habeas history, and the approach of that era has since been discredited.

ARGUMENT

I. Garlotte has already had his day in court; the question is whether the state must endure another one.

The question in this case is definitely not one of "denying to petitioner his ultimate day in court." Cf. Brief for Petitioner 29, n. 21, quoting *Carafas* v. *La Vallee*, 391 U. S. 234, 239 (1968).[2] Garlotte's claims have already been made. They have already been reviewed. They have already been decided. The highest court of the state has written a published opinion on them. *Garlotte* v. *State*, 530 So. 2d 693 (Miss. 1988).

The question presented is whether the state, having marshalled its resources once to prosecute Garlotte and again to defend its judgment on state collateral attack, must do so a third time in federal court. In a world of unlimited resources, there would be less objection to such a procedure, but resources are always limited. A decision to spend them on this purpose is *per se* a decision not to spend them on something else. In the real world, a rational government must balance the cost of avoiding a risk against the likelihood and severity of the danger. See S. Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 18-19 (1993).

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2. References to petitioner's brief are to the copy served on March 1. We understand petitioner intends to make an amendment which may alter the pagination of the final copy.

A. The Cost of Relitigation.

In noncapital cases, the principal cost to the states of relitigation on federal habeas corpus lies not in the very few claims that have merit but in the vast bulk that do not. A recent study of noncapital habeas by the National Center for State Courts showed that out of 1,626 petitions a mere 17 were granted. V. Flango, Habeas Corpus in State and Federal Courts 61 (1994).

Searching the haystack for needles would be less of a problem for the state if more petitions could be summarily dismissed without an answer. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") was drafted with this in mind. "[I]t is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Advisory Committee Note to Habeas Rule 4.

The Court of Appeals' initial action in this case, before discovery of the jurisdictional defect, illustrates how the changing nature of constitutional litigation has overtaken the summary screening procedure contemplated by the drafters of the Habeas Rules. Among Garlotte's claims were "that his guilty plea was involuntary and that he was denied effective assistance of counsel." Order, App. G to Pet. for Cert. 1. Given the extraordinarily broad meaning of the term "involuntary," Circuit Judge Duhé appeared skeptical that such claims could ever be dismissed under Rule 4. He granted the certificate of probable cause and ordered briefing on "the issue of whether the district court prematurely dismissed the petition without requiring an answer and without conducting an evidentiary hearing." *Id.*, at 2.

It was not supposed to be this way. When this Court laid down the rule of *Boykin* v. *Alabama*, 395 U. S. 238 (1969), it did so on the explicit premise that the record so established would be "adequate for any review that may later be sought [citations], and forestall[] the spin-off of collateral proceedings that seek to probe murky memories." *Id.*, at 244 (footnotes omitted). The trial judge in Garlotte's case "conducts one of the most thorough and explicit plea hearings [the Mississippi

Supreme] Court has had the opportunity to read." *Garlotte* v. *State*, *supra*, 530 So. 2d, at 694. The federal magistrate agreed. Report and Recommendation, App. B to Pet. for Cert. 3. Yet the collateral proceeding was not forestalled.

Then there is ineffective assistance. In *Strickland* v. *Washington*, 466 U. S. 668 (1984), the Court recognized the danger. "The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Id.*, at 690.

T[illegible] *Strickland* Court evidently thought it had crafted the stand[illegible] to avoid proliferation, but it has not turned out that way [illegible]ective assistance is claimed in nearly half of federal habea[illegible]ons. Flango, Habeas Corpus in State and Federal Courts, [illegible] at 45. It is easily the most common claim in federal pe[illegible] in diverse jurisdictions around the country. *Id.*, at 58, Table 15, under heading "Federal Courts" (data from Alabama, California, New York, and Texas).

Claims that the attorney gave incompetent advice, see *Strickland*, *supra*, at 687, or failed to completely investigate, see *id.*, at 690-691, are not the kinds of claims that lend themselves to summary disposition. They are also not claims that the state can protect itself against, because the shroud of attorney-client privilege limits the state's ability to supervise the attorney in these matters.

Given the present state of the law, then, if these matters are cognizable on federal habeas corpus in a particular case, they will frequently require proceedings beyond the screening contemplated by Rule 4.[3] From a policy standpoint, the question is whether the risk that the state courts have overlooked a federal constitutional violation justifies the cost of litigating that question yet again, after it has already been considered and decided once. If state appellate courts catch 90% of trial errors, and state habeas courts catch another 9%, is it worth the cost of

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3. Summary disposition of claims involving facts outside the trial record would be proper where the state collateral review court has detailed its findings of fact. However, unexplained denials are the norm in these cases. See Flango, *supra*, at 66.

federal habeas to get the last 1%? Cf. Breyer, Breaking the Vicious Circle, *supra*, at 11; see also Flango, *supra*, at 62, Table 17 (grant rates). "[T]he quest for error correction must, at some point, end." S. O'Connor, Local Control of Crime 6 (1991), reprinted in Habeas Corpus Issues, Serial No. 39, 102d Cong., 1st Sess. 192, 198 (1992). The answer to that question may well depend on what remains at stake when the petition is filed.

B. Finality and Habeas Corpus.

The evolution of habeas corpus from the limited review of the jurisdiction of the original court to the *de novo* review of a vast array of constitutional questions has been thoroughly reviewed in this Court. See, *e.g.*, *Stone* v. *Powell*, 428 U. S. 465, 474-477 (1976). It need not be rehashed here. It is sufficient to note that the norm in Anglo-American jurisprudence is that judgments of competent courts are final when they are final, and that was originally true of criminal judgments challenged on habeas corpus, *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830) (Marshall, C.J.), even on constitutional grounds. *Ex parte Watkins*, 7 Pet. (32 U. S.) 568, 574 (1833) (Story, J.) (Eighth Amendment claim); *Matter of Moran*, 203 U. S. 96, 105 (1906) (Holmes, J.) (self-incrimination claim). Exceptions to the general rule of finality require justification.

Brown v. *Allen*, 344 U. S. 443 (1953) is generally thought to have established a rule of mandatory *de novo* review of constitutional questions. It is not difficult to see why such review was thought necessary in a racial discrimination case in 1953. At this point in history, there is a strong argument that although this rule needs to be changed, Congress and not the courts should change it. Compare O'Connor, Local Control of Crime, *supra*, at 8, Habeas Corpus Issues, at 200 with *Wright* v. *West*, 120 L. Ed. 2d 225, 247-248, 112 S. Ct. 2482, 2498 (1992) (O'Connor, J., concurring in the judgment).[4]

To say that only Congress should abrogate *Brown*, however, is not to say that the judiciary must extend *de novo* review to

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4. The House of Representatives recently approved the Cox Amendment to H. R. 729 to do exactly that, by a vote of 291 to 140. 141 Cong. Rec. H1427-H1428 (Feb 8, 1995).

new places where precedent does not require it. Review of the ›f two consecutive sentences, already expired by the time of ;, is such a new place.

Even though habeas corpus has been bloated beyond ·cognition, see *Braden* v. *30th Judicial Circuit Court*, 410 U. S. 484, 501 (1973) (Blackmun, J., concurring in the result), it is not yet a complete appeal to the lower federal courts of every question this Court might review on certiorari. Questions arising under federal statutes, if not fundamental, are still final when they are final. See *Reed* v. *Farley*, 129 L. Ed. 2d 277, 292, 114 S. Ct. 2291, 2300 (1994). So, too, are criminal judgments in which only a fine or other noncustodial sentence is imposed. See, *e.g.*, *Lillios* v. *New Hampshire*, 788 F. 2d 60, 61 (CA1 1986) (*per curiam*).

The custody requirement thus provides something of an "amount in controversy" limitation for habeas relitigation. Cf. 28 U. S. C. § 1332 (civil diversity jurisdiction). Judgments which only deprive the defendant of property do not create a danger of error of the same magnitude as those which deprive the defendant of liberty, and thus they warrant a lesser degree of review.

The same is true of those judgments where, although the defendant has been incarcerated, he is not subject to any further restraint as of the time of filing. Petitioner cites some pre-*Maleng* Court of Appeals cases for the proposition that the habeas court should look to the time of filing of the state "exhaustion" petitions, rather than the federal petition itself, for the custody requirement. Brief for Petitioner 29-30, n. 21. However, this Court has never endorsed such a procedure, the clear language of the statute refutes it, and *Maleng* v. *Cook*, 490 U. S. 488, 491 (1989) (*per curiam*) says the clear language controls. The proposition is also refuted by the clear language of Rule 1(a) of the Habeas Rules. Petitioners invoking section 2254 are divided into two groups: Those attacking present custody and those attacking future custody. There is no ghost of custody past. Rule 1(b) contemplates application of the Rules to other situations, but the first paragraph of the Advisory Committee Note makes clear that this refers to persons in custody other than "pursuant to a judgment of a state court," *i.e.*, not section 2254.

As a result, at least where only a single sentence is imposed, sentences so brief that they will expire before state remedies are exhausted are effectively immune from relitigation on federal habeas corpus. The state courts can prevent this effect by granting bail or own-recognizance release during the exhaustion period, see, *e.g.*, *Hensley* v. *Municipal Court*, 411 U. S. 345, 351 (1973), but if they keep the prisoner in prison so that the full sentence is served, there is no habeas relitigation.

The idea that the exhaustion requirement might prevent any habeas review at all is far from novel. It has done so from the very beginning. In the nineteenth century, state defendants had the right to a writ of error to this Court for review of their federal questions. See Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386-387. Exhaustion included employment of this writ, absent exceptional circumstances. *Urquhart* v. *Brown*, 205 U. S. 179, 181-182 (1907). Thus, exhaustion originally included the resolution by this Court of every properly preserved federal question, leaving nothing to resolve on habeas.

The issues of custody, exhaustion, and multiple offenses suggest several variations on a theme. Putting aside the special question of habitual criminal enhancement, let us consider three potential habeas petitioners: A, B, and C.

- A commits burglary, is sentenced to one year in prison, and is discharged the day before his appeal is decided.

- B commits burglary, is sentenced to one year in prison, and is released the day before his appeal is decided. The next day he commits robbery and is subsequently sentenced to four years for that offense, a period sufficient to exhaust state remedies.

- C commits burglary and robbery, is sentenced to one and four years, respectively, served consecutively in that order. One year and a day later his appeal is decided.

A clearly cannot attack his burglary conviction on habeas corpus. That is the plain meaning of the custody requirement. B also cannot. That, in essence, is *Maleng* v. *Cook*. At least absent any formal use of his burglary to enhance the robbery

conviction,[5] he also cannot use any leftover grievance on the burglary to demand "credit" on the robbery. His burglary conviction is really final. It is res judicata.

Is there any reason C should have greater review rights on his burglary than A or B? If the other one-year sentences are below the threshold for habeas review, should this one be reviewable merely because it is followed by a longer sentence for a worse crime?

More graphically, let us return to Garlotte's case. If his marijuana conviction would otherwise not be reviewable on habeas due to the requirements of custody and exhaustion, should Garlotte get *greater* review rights as a reward for having murdered two people?

II. The *Peyton-Hensley* line of cases ran roughshod over earlier precedent and should not be extended.

Petitioner appeals to tradition, but the earliest case he cites in support is *Jones* v. *Cunningham*, 371 U. S. 236 (1963). See Brief for Petitioner 26-30. A discussion of tradition that *begins* in the middle of the Warren Court is like a wine list that begins with the vintage before last.

There is a very good reason for petitioner's repressed memory. The earlier cases are contrary to his position. True respect for tradition requires not only acknowledgement of the "traditional remedial purposes" of the writ, but also acknowledgement of its traditional limits.

A. The Traditional View.

An appeal to the "remedial purposes" of the writ, see Brief for Petitioner 26, immediately raises the question "remedy for what?" Penicillin has remedial purposes too, but that is no reason to prescribe it for every illness. The "remedial purpose" of habeas corpus, historically, was *custody* pure and simple. A

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5. The enhancement question remains unresolved at this point. See *post*, at 18.

court on habeas could order the prisoner released and nothing else. See, *e.g.*, *Re Medley*, 134 U. S. 160, 173 (1890).

The limited power of the habeas court was dramatically illustrated by the *McCready* case. McCready was an out-of-state oyster fisherman arrested under a Virginia protectionist act. In 1874, before the exhaustion doctrine, a federal habeas court declared the statute unconstitutional and discharged him from custody. *Ex parte McCready*, 15 F. Cas. 1345 (CCED Va. 1874). Yet the state courts reindicted and tried McCready, see *id.*, at 1346 (Reporter's Note); *McCready* v. *Commonwealth*, 27 Gratt. (68 Va.) 985 (1876), and this Court affirmed the conviction. *McCready* v. *Virginia*, 94 U. S. 391, 397 (1877).

Remarkable by its absence from the arguments and opinion in *McCready* is any contention that the habeas judgment precluded the reprosecution. Apparently it was obvious to the bar and bench in 1877 that the habeas decision had no legal effect beyond releasing McCready from custody.[6]

Thus the limitation of habeas corpus to custody and nothing but custody was firmly in place when the Court decided the famous case of *Wales* v. *Whitney*, 114 U. S. 564 (1885). Wales had simply been ordered by his military superior not to leave town and to report on a certain date for a court-martial. *Id.*, at 566. The District of Columbia court denied habeas relief, and this Court affirmed. Because this Court at that time had no appellate jurisdiction over military courts, its power in the matter was limited to the habeas power, which was purely over custody. *Id.*, at 570-571. Since Wales was not in custody within the meaning of the statute, the Court had no power to review the matter on habeas corpus. *Id.*, at 574-575.

Ex parte Baez, 177 U. S. 378 (1900) similarly follows from the same principle. Baez was convicted of a minor offense in Puerto Rico and challenged the jurisdiction of the court. *Id.*, at 385-386. Although he was still in custody under a 30-day sentence when the case reached this Court, he was scheduled to be released before the government's answer was due. The case

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6. We cite this Court's decision in *McCready* as history, not precedent. Cases are not authority for propositions not considered. *Webster* v. *Fall*, 266 U. S. 507, 511 (1925).

was dismissed as moot, because the only matter properly at issue, custody, would end before the Court could decide it. *Id.*, at 390. *Baez* was followed in *Re Lincoln*, 202 U. S. 178, 179 (1906).

In *Stallings* v. *Splain*, 253 U. S. 339 (1920), a pretrial habeas application by a federal prisoner, bail had been granted after the filing of the habeas application. *Id.*, at 340-341. Justice Brandeis, writing for the Court, stated that "Stallings's position was thereafter no better than if he had applied for the writ after he had given bail. It is *well settled* that, under such circumstances, a petitioner is not entitled to be discharged on *habeas corpus*. [Citations.] Being no longer under actual restraint . . . he was not entitled to the writ of habeas corpus. *Wales* v. *Whitney*, 114 U. S. 564." *Id.*, at 343 (emphasis added); see also *Johnson* v. *Hoy*, 227 U. S. 245, 247-248 (1913).

The consecutive sentence cases rest on this same understanding of the nature and limits of the writ. In *Re Swan*, 150 U. S. 637 (1893), the petitioner was a local constable held in contempt for seizing a barrel of liquor which was in the custody of the federal court. The contempt order had three components: (1) that he be jailed until he returned the barrel; (2) that he be jailed an additional three months as punishment; and (3) that he further remain in jail until he paid the costs of the proceedings. *Id.*, at 637-639. The Court refused to go to the merits of the order for costs, because Swan could not be discharged on habeas until he had both returned the barrel and served the punitive three months. *Id.*, at 653. *Swan* was followed on similar facts in *Tinsley* v. *Anderson*, 171 U. S. 101, 107 (1898).

Thus, when Justice Stone wrote his unanimous opinion in *McNally* v. *Hill*, 293 U. S. 131 (1934) the law was already settled. McNally had been convicted in federal court on three counts involving interstate auto theft. The first sentence was shorter than and concurrent with the second, and thus of no importance. The third, which he wished to challenge, was consecutive to the second. The second had not yet expired, but McNally had served enough to be eligible for parole under it. *Id.*, at 133-134.

The *McNally* Court proceeded to review the history and purpose of habeas corpus in England and America. *Id.*, at 136-139. Even when the judgment of conviction is void for lack of jurisdiction, the Court concluded, "its operation may be stayed by *habeas corpus* only through the exercise of the authority of the court to remove the prisoner from custody. *That authority cannot be exercised where the custody is lawful.*" *Id.*, at 139 (emphasis added).

Ex parte Hull, 312 U. S. 546 (1941) is fully consistent with the other cases construing the custody requirement. Hull was a habitual sex offender who was convicted of one offense, paroled, and within a year convicted of another. *Id.*, at 547. "Apparently for the *sole* reason that the second conviction was regarded as a violation of his parole," his parole on the first offense was revoked. *Ibid.* (emphasis added). In holding that the second conviction could be reviewed, and distinguishing *McNally*, the Court again noted that parole was revoked only because of the second conviction, *id.*, at 549-550, with the clear implication that Hull would be restored to parole if the second conviction were invalidated.

Parker v. *Ellis*, 362 U. S. 574 (1960) was a straightforward application of these traditional principles. Parker's sentence had expired pending this Court's review, *id.*, at 575, and thus *Baez*, *supra*, and *Lincoln*, *supra*, were squarely on point. There was nothing further a habeas corpus court could do for him. Justice Harlan noted in a concurring opinion that even collateral effects of the conviction were moot, since Parker had numerous other felony convictions. *Id.*, at 576.

Chief Justice Warren's dissent shows why there was a movement to extend habeas review to such cases. In this pre-*Gideon* case, Parker was tried for a felony without an attorney, denied a transcript for his appeal, and also denied an attorney for the appeal. *Id.*, at 580-581, and n. 6. The problems that created Parker's predicament have, of course, long since been corrected. See *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (trial counsel); *Douglas* v. *California*, 372 U. S. 353 (1963) (appellate counsel); *Griffin* v. *Illinois*, 351 U. S. 12 (1956) (transcript, decided after Parker's direct appeal).

Jones v. *Cunningham*, 371 U. S. 236 (1963) is fully consistent in its result with the earlier cases. The holding of the case is just the unremarkable proposition that a parolee remains in the custody of the parole board, as both the statute and the parole order in question clearly stated. See *id.*, at 241-242. The case is significant only for Justice Black's rhetorical flourish, saying the writ of habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Id.*, at 243. This gratuitous dictum about growth would be invoked ever after by those who sought to make the writ into a substitute for appeal, which the Court had always denied it was. See, *e.g.*, *Sunal* v. *Large*, 332 U. S. 174, 178 (1947); accord *Reed* v. *Farley*, 129 L. Ed. 2d 277, 292, 114 S. Ct. 2291, 2300 (1994).

B. The Expansive View.

We have discussed the older cases at some length to illustrate just how much precedent was perfunctorily tossed out in the five-year period from 1968 to 1973. If tradition is to be the touchstone of the present case, that tradition weighs heavily against extension of these cases, "by even a fraction of an inch." Cf. *Silverman* v. *United States*, 365 U. S. 505, 512 (1961).

Peyton v. *Rowe*, 391 U. S. 54, 67 (1968) overruled *McNally*. There are three reasons given. First, there were compelling practical considerations in Rowe's case indicating that if federal habeas did not presently extend to his claim it might never be adequately heard in any forum. Second, there was a historical attack on *McNally*. Third, there was the quoted dictum from *Jones*, *supra*. Only the first is defensible, and it is inapplicable to the present case.

Rowe was convicted of rape and sentenced to 30 years in prison. *Id.*, at 55. He then pleaded guilty to "felonious abduction with intent to defile" the same victim and received another consecutive term of 20 years. *Id.*, at 55-56. His claims of ineffective assistance, double jeopardy, and involuntary plea were never heard in state court, because the state followed *McNally*. *Id.*, at 56, and n. 2.

Beyond question, there were powerful practical reasons for litigating the ineffective assistance claim promptly and not 30 years hence. Collateral attacks on guilty pleas "that seek to probe murky memories" are notoriously difficult. *Boykin* v. *Alabama*, 395 U. S. 238, 244 (1969); *Parke* v. *Raley*, 121 L. Ed. 2d 391, 407, 113 S. Ct. 517, 524-525 (1992). Such a proceeding three decades hence would be a mockery.

These practical considerations are inapplicable to Garlotte's case. Jurisdiction exists now or never. Recognizing this, petitioner contends that practical considerations could not be the basis for *Peyton*, because practicality is insufficient to surmount a jurisdictional barrier. Brief for Petitioner 14, n. 9. There is certainly good authority for this principle, see, *e.g.*, *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 294 (1970), but if applied to *Peyton* it would call for overruling that case, not extending it. In any event, this Court has adopted extremely strained constructions of habeas jurisdictional requirements when necessary to see that an otherwise cognizable claim will be heard in other contexts. See *McFarland* v. *Scott*, 129 L. Ed. 2d 666, 674, 114 S. Ct. 2568, 2571-2572 (1994). It almost goes without saying that such stretches should not be stretched beyond the practicalities which require them.

When it sought to attack the historical basis of *McNally*, the *Peyton* Court lapsed into the regrettable historical disingenuousness that characterizes the habeas decisions of this period. See generally Mayer, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451 (1966); *Fay* v. *Noia*, 372 U. S. 391, 449-463 (1963) (Harlan, J., dissenting). The *Peyton* Court asserts there was only one prior decision, *Swan*, *supra*, supporting the *McNally* rule of prematurity. *Peyton*, 391 U. S., at 65, n. 18. Not so. See *Tinsley*, *supra*, 171 U. S., at 107. It asserted that *Hull* granted habeas review to a petitioner who would not be released if he prevailed. 391 U. S., at 67. Not so. See *ante*, at 12.

Worst of all, *Peyton*'s comments about the scope of relief available on habeas, *id.*, at 66-67, simply ignore *Wales*, *Baez*, *Lincoln*, and *Stallings*. See *ante*, at 10-11. While these cases

might have been distinguished, the failure to do so while making a blanket statement set the stage for their overruling.

Carafas v. *La Vallee*, 391 U. S. 234 (1968) was decided the same day. Carafas's case was far less compelling. He had been convicted of burglary and larceny in a pre-*Mapp* trial with evidence he claimed was illegally seized, a claim rejected on the merits in his post-*Mapp* appeal. *Id.*, at 235-236, and n. 1. The federal district court also rejected his claim on the merits, and the Second Circuit dismissed his appeal. He was released from custody while his certiorari petition was pending. *Id.*, at 236.

Parker v. *Ellis*, *supra*, *Ex parte Baez*, *supra*, and *Re Lincoln*, *supra*, were all on point. Following the pattern set in *Peyton*, the *Carafas* Court proceeded to attack the most recent decision, *Parker*. It mentioned *Baez* only in passing in a footnote, 391 U. S., at 238, n. 12, and completely ignored *Lincoln*.

Rejecting the uniform line of habeas authority, *Carafas* said the case was not moot, citing two direct review cases and one coram nobis case. *Id.*, at 237-238. Reliance on the coram nobis case, *United States* v. *Morgan*, 346 U. S. 502 (1954), is especially peculiar, because that case extended common law coram nobis to an out-of-custody federal convict precisely *because* he was no longer eligible for habeas or 28 U. S. C. § 2255. See *Morgan*, 346 U. S., at 504, 512-513.

It is true enough, as *Carafas* says, that "collateral consequences" exist from a fully expired state felony conviction. 391 U. S., at 237-238. But it is far from "clear" that the habeas case was not moot, for it is not clear that Congress has ever empowered the lower federal courts to grant relief from such collateral consequences. The traditional view was that, when a judgment had multiple consequences including custody, habeas reached only the custody and let the others stand. The habeas court's "power *then* extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the [convicting] court." *Wales* v. *Whitney*, 114 U. S. 564, 570 (1885) (emphasis in original).

The statutory language relied on by *Carafas*, 391 U. S., at 239, is not to the contrary. The "law and justice require" language was in the statute well before *Wales*. See R. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of

Habeas Corpus 648 (2d ed. 1876). The more recent "other remedy" language refers to the effect of a prior *denial* and cannot be considered a new grant of power.

The last major case in the series is *Hensley* v. *Municipal Court*, 411 U. S. 345 (1973). Hensley ran a diploma mill churning out dubious Doctor of Divinity degrees, for which he was sentenced to a year in jail and a fine, but the state courts generously released him on his own recognizance while he pursued his appeals. *Id.*, at 346-347, and n. 2. The only restrictions under this status are an agreement to appear in court when required and waiver of extradition if apprehended outside the state. *Id.*, at 348.

In an opinion joined by a bare majority of the Court, Justice Brennan declared that Hensley was "in custody" for the purpose of the statute. *Id.*, at 353. A long line of precedent was contrary, including *Wales*, *supra*, *Stallings*, *supra*, *Johnson* v. *Hoy*, 227 U. S. 245 (1913), and *Baker* v. *Grice*, 169 U. S. 284 (1898). These cases were declared "no longer controlling" on the remarkable ground that they were *not* mentioned in *Peyton*, *Carafas*, and *Jones*. 411 U. S., at 350, n. 8. A decent respect for the values underlying *stare decisis* would normally point to the opposite conclusion. Where a recent decision has ignored a long line of earlier contrary authority, the recent aberration should be recognized as such and corrected. "[T]he means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986), should not tolerate overruling by ignoring. See *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 51, 58, n. 30 (1977); *United States* v. *Moreland*, 258 U. S. 433, 436 (1922).

The threadbare nature of petitioner's reliance on this line of cases is illustrated by his statement that "the writ's operation 'is to a large extent uninhibited by traditional rules of finality and federalism.' " Brief for Petitioner 26, quoting *Hensley*. That was true only in the comparatively narrow slice of judicial history to which *Hensley* belongs. It was not true earlier, see, *e.g.*, *Ex parte Royall*, 117 U. S. 241, 251-252 (1886) (federalism, exhaustion); *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (*per curiam*) (finality, habeas court will "not ordinarily re-examine" claims litigated in state court), and it is not true now.

Hensley's denigration of the finality interests is in tune with *Fay* v. *Noia*, *supra*, which has since been overruled precisely because it denigrated those interests. "*Fay* was based on a conception of *federal/state relations* that undervalued the importance of state procedural rules . . . . We now recognize *the important interest in finality* served by state procedural rules . . . ." *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991) (emphasis added). Just as renewed recognition of the importance of finality and federalism resulted in reestablishment of the procedural default rule, so should it result in the refusal to extend any further the expansive view of "custody" left over from the *Fay* era.

The result in *Hensley* is perhaps defensible on the facts of the case on practical grounds. As in *Peyton*, habeas jurisdiction would attach in the future, so it was merely a question of when, not if, the case would be heard in federal court. *Hensley*, 411 U. S., at 352. Again as in *Peyton*, these practical considerations do not justify an uncritical adoption of *Hensley*'s bombastic denunciation of traditional limits on the scope of habeas corpus as "stifling formalisms" and "manacles of arcane and scholastic procedural requirements." See *id.*, at 350. It is precisely because habeas corpus is so powerful, being exempt from the usual rule of res judicata, that it must be kept within limits.

C. Reassertion of Limits.

This point was recognized in *Lehman* v. *Lycoming County Children's Services*, 458 U. S. 502, 512-513 (1982). *Lehman* involved child custody disputes, a species of litigation where the finality interest is exceptionally strong. *Id.*, at 513-514. Yet it does involve a construction of the custody requirement, and it frankly adopts a cost-benefit approach to that question. "The federal writ of habeas corpus, representing as it does a profound interference with state judicial systems and finality of state decisions, should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns." *Id.*, at 515-516.

Finally, the limits of "custody" were again reasserted in this Court's most recent word on the subject, *Maleng* v. *Cook*, 490 U. S. 488 (1989). The Ninth Circuit had held, in a remarkable extension of *Carafas*, that Cook was still in custody under a

sentence which expired ten years earlier, because that conviction had been used to enhance a subsequent conviction. *Id.*, at 489-490. This Court reversed. "While we have very liberally construed the 'in custody' requirement for purposes of federal habeas, we have never extended it to the situation where a habeas petitioner suffers no present restraint from a conviction." *Id.*, at 492.

The Court noted that the jurisdictional custody requirement was met for attacking the second conviction, but expressed no view on the substantive question of whether errors in the prior proceeding would be grounds for relief. *Id.*, at 493-494. Cf. *Custis* v. *United States*, 128 L. Ed. 2d 517, 528, 114 S. Ct. 1732, 1738 (1994) (attack on prior at sentencing limited to *Gideon* claims).

III. No federal interest in this case outweighs the federalism and finality concerns.

This case, *amicus* submits, comes down to the *Lehman* question. The answer is not dictated by prior opinions, nor does it clearly follow from the words of the statute. Is this an "instance[] in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns"? *Lehman*, *supra*, 458 U. S., at 516.

In part I, *ante*, at 3-9, we discussed the cost of habeas litigation to the state in cases where relief is ultimately denied. A secondary, but also significant, cost is the possibility that the "corrective" process will introduce new error into a previously error-free case. For example, in *Dunn* v. *Simmons*, 877 F. 2d 1275, 1279 (CA6 1989), cert. denied *sub nom. Simmons* v. *Dunn*, 494 U. S. 1061 (1990), a federal court said that a certain state procedure did "not comply with federal standards." Three years later, too late to correct this error, this Court held without dissent that the procedure in question "*easily* passes constitutional muster." *Parke* v. *Raley*, 121 L. Ed. 2d 391, 403, 113 S. Ct. 517, 522 (1992) (emphasis added). The state thus has powerful interests both in avoiding the costs of habeas relitigation and in avoiding the erroneous overturning of its valid judgments.

In *O'Neal* v. *McAninch*, No. 93-7407 (U. S., Feb. 21, 1995), this Court emphasized that habeas corpus was different from other civil proceedings, because "someone's custody, rather than mere civil liability, is at stake." *Id.*, slip op., at 7. The Court further noted that "we are dealing here with an error of constitutional dimension—the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person." *Id.*, slip op., at 9. Taken together, these statements indicate the kind of federal interest thought to justify relitigation on habeas corpus. The possibility that a person who may be innocent was convicted in violation of his constitutional rights and remains in prison is a risk which justifies relitigation. If the outcome is positive that a violation occurred but is ambivalent about whether it was harmful, the risk of wrongful imprisonment outweighs the risk of a wrongful acquittal on retrial. *Id.*, slip op., at 10.

Garlotte is most definitely not an innocent man. He has been convicted, in a judgment not challenged here, of murdering two people. If he is never paroled, his punishment is no greater than he deserves, and perhaps less.[7]

Garlotte contends that this case involves his custody under the marijuana charge because he will be *eligible* for parole ten months earlier if that charge is set aside. Brief for Petitioner 19, n. 14. Assuming that to be true for the sake of argument,[8] it is pure speculation that the parole authorities actually would parole this double murderer in the first ten months of his eligibility.

Is this speculative possibility the kind of grave injustice that justifies relitigation in federal court of claims already considered and rejected in state court? Regardless of what happens in this case, Garlotte's time in prison will be within the range of punishment authorized for the crime of murder. There is *no* possibility of an unjust incarceration in this case.

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7. If he should successfully challenge those convictions, his marijuana sentence having been served, he would be entitled to immediate release or retrial.

8. The Attorney General is far better able than *amicus* to discuss Mississippi parole law, and so we will not attempt it.

In other cases under other sentencing systems, it is possible that, under the rule applied by the Court of Appeals, a person who is guilty of one crime but sentenced for two could serve a somewhat longer sentence than the law prescribes for the second, valid conviction. Returning to our earlier hypotheticals, see *ante*, at 8, prisoner C would serve five years for burglary and robbery, when it is conceivable he should have only served four years for robbery. This would occur *if* C's claims have merit, which escaped the notice of the state courts, and *if* he is actually innocent.

Both of these "ifs" are unlikely, and they are especially unlikely together. We have already discussed how rare it is for a meritorious claim to get past the state courts. *Ante*, at 6. This Court recently noted how exceedingly rare it is for a substantial claim of actual innocence to make it to federal habeas corpus. *Schlup* v. *Delo*, No. 93-7901 (U. S., Jan. 23, 1995) slip op., at 22-23. The great number of issues cognizable on habeas corpus having little or no connection to the integrity of the fact-finding process, see *Rose* v. *Lundy*, 455 U. S. 509, 543-544 (1982) (Stevens, J., dissenting); *Vasquez* v. *Hillery*, 474 U. S. 254, 267 (1986) (O'Connor, J., concurring in the judgment), makes these two conditions largely independent. The intersection of two small and substantially independent subsets of the very large class of criminal cases is a very small set indeed.

And what is the magnitude of this vanishingly rare occurrence? It is a properly convicted felon spending a year or possibly two longer in prison than the law of jurisdiction prescribes for the second, valid conviction. That is a lesser, or perhaps equal, injustice compared to the case of a completely innocent man jailed for a year on a single offense, yet the latter case is "below the radar" of federal habeas corpus. (Prisoner A in our hypotheticals, *ante*, at 8.)

Amicus does not denigrate the importance of constitutional rights, and we do not imply that wrongful conviction on one charge is not unjust if the defendant is actually guilty of another. Our point is that perfection is unachievable, and we cannot chase after vanishingly small probabilities forever. See *ante*, at 6. The extremely low grant rate in noncapital cases demonstrates that state courts today *are* diligently protecting constitutional

rights.[9] The sometimes stunningly wrong decisions of the lower federal courts, such as *Dunn* v. *Simmons*, *supra*, show that a grant of habeas corpus does not necessarily mean an error actually occurred.

A custodial sentence which remains unexpired on the day the federal petition is filed is the threshold "amount in controversy" for federal habeas relitigation of a single offense; lesser offenses are trusted to the judgment of the state courts, subject only to this Court's review on certiorari. If a second, consecutive, unchallenged sentence for a different offense has any effect on the risk versus cost calculus, it is only to diminish the magnitude of the risk. It cannot tip the balance in the opposite direction.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

March, 1995

Respectfully submitted,

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9. The insulting assumption that state court judges will only do their duty under threat of having their decisions overturned on habeas, see *Butler* v. *McKellar*, 494 U. S. 407, 430, n. 12 (1990) (Brennan, J., dissenting), requires far more justification than has been offered for it to date.